No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL A. NEWDOW, ET AL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

THEODORE B. OLSON
Solicitor General
Counsel of Record

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

PAUL D. CLEMENT
Deputy Solicitor General

PATRICIA A. MILLETT
Assistant to the Solicitor General

ROBERT M. LOEB
LOWELL V. STURGILL
SUSHMA SONI
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514–2217

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-16423
D.C. No. CV 00-00495-MLS/PAN

MICHAEL A. NEWDOW, PLAINTIFF-APPELLANT

v.

U.S. CONGRESS; UNITED STATES OF AMERICA; GEORGE W. BUSH,* PRESIDENT OF THE UNITED STATES; STATE OF CALIFORNIA; ELK GROVE UNIFIED SCHOOL DISTRICT; DAVID W. GORDON, SUPERINTENDENT EGUSD; SACRAMENTO CITY UNIFIED SCHOOL DISTRICT; JIM SWEENEY, SUPERINTENDENT SCUSD, DEFENDANTS-APPELLEES

Appeal from the United States District Court for the Eastern District of California, Milton L. Schwartz, Senior Judge, Presiding

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Argued and Submitted: March 14, 2002
Filed: June 26, 2002
Amended: February 28, 2003

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* George W. Bush is substituted for his predecessor, William Jefferson Clinton, as President of the United States. Fed. R. App. P. 43(c)(2).

AMENDED OPINION AND
AMENDED CONCURRENCE/DISSENT

Before: ALFRED T. GOODWIN, STEPHEN REINHARDT and FERDINAND F. FERNANDEZ, Circuit Judges.

Opinion by Judge Goodwin; Partial Concurrence and Partial Dissent by Judge Fernandez

GOODWIN, Circuit Judge:

Michael Newdow appeals pro se a judgment dismissing his challenge to the constitutionality of the words "under God" in the Pledge of Allegiance to the Flag. Newdow argues that the addition of these words by a 1954 federal statute to the previous version of the Pledge of Allegiance (which made no reference to God) and the daily recitation in the classroom of the Pledge of Allegiance, with the added words included, by his daughter's public school teacher are violations of the Establishment Clause of the First Amendment to the United States Constitution.

FACTUAL AND PROCEDURAL BACKGROUND

Newdow is an atheist whose daughter attends public elementary school in the Elk Grove Unified School District ("EGUSD") in California. In accordance with state law and a school district rule, EGUSD teachers begin each school day by leading their students in a recitation of the Pledge of Allegiance ("the Pledge"). The California Education Code requires that public schools begin each school day with "appropriate patriotic exercises" and that "[t]he giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy" this requirement. Cal. Educ. Code § 52720

(1989) (hereinafter "California statute").[1] To implement the California statute, the school district that Newdow's daughter attends has promulgated a policy that states, in pertinent part: "Each elementary school class [shall] recite the pledge of allegiance to the flag once each day." The classmates of Newdow's daughter in the EGUSD are led by their teacher in reciting the Pledge codified in federal law. On June 22, 1942, Congress first codified the Pledge as "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all." Pub. L. No. 623, Ch. 435, § 7, 56 Stat. 380 (1942) (codified at 36 U.S.C. § 1972). On June 14, 1954, Congress amended Section 1972 to add the words "under God" after the word "Nation." Pub. L. No. 396, Ch. 297, 68 Stat. 249 (1954) ("1954 Act"). The Pledge is currently codified as "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all." 4 U.S.C. § 4 (1998) (Title 36 was revised and recodified by Pub. L. No. 105-225, § 2(a), 112 Stat. 1494 (1998). Section 172 was abolished, and the Pledge is now found in Title 4.)

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[1] The relevant portion of California Education Code § 52720 reads:

> In every public elementary school each day during the school year at the beginning of the first regularly scheduled class or activity period at which the majority of the pupils of the school normally begin the schoolday, there shall be conducted appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section.

Newdow does not allege that his daughter's teacher or school district requires his daughter to participate in reciting the Pledge.[2] Rather, he claims that his daughter is injured when she is compelled to "watch and listen as her state-employed teacher in her state-run school leads her classmates in a ritual proclaiming that there is a God, and that our's [sic] is 'one nation under God.'" Newdow's complaint in the district court challenged the constitutionality, under the First Amendment, of the 1954 Act, the California statute, and the school district's policy requiring teachers to lead willing students in recitation of the Pledge. He sought declaratory and injunctive relief, but did not seek damages.

The school districts and their superintendents (collectively, "school district defendants") filed a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss for failure to state a claim. Magistrate Judge Peter A. Nowinski held a hearing at which the school district defendants requested that the court rule only on the constitutionality of the Pledge, and defer any ruling on sovereign immunity. The United States Congress, the United States, and the President of the United States (collectively, "the federal defendants") joined in the motion to dismiss filed by the school district defendants. The magistrate judge reported findings and a

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[2] Compelling students to recite the Pledge was held to be a First Amendment violation in *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 642 (1943) ("[T]he action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."). *Barnette* was decided before the 1954 Act added the words "under God" to the Pledge.

recommendation that the district court hold that the daily Pledge ceremony in the schools did not violate the Establishment Clause. District Judge Edward J. Schwartz approved the recommendation and entered a judgment of dismissal. This appeal followed.

DISCUSSION

A. Jurisdiction

Newdow asks the district court to order the President of the United States ("the President") to "alter, modify or repeal" the Pledge by removing the words "under God"; and to order the United States Congress ("Congress") "immediately to act to remove the words 'under God' from the Pledge." The President, however, is not an appropriate defendant in an action challenging the constitutionality of a federal statute. *See Franklin* v. *Massachusetts*, 505 U.S. 788, 802-03 (1992) (plurality) (observing that a court of the United States " 'has no jurisdiction of a bill to enjoin the President in the performance of his official duties' ") (quoting *Mississippi* v. *Johnson*, 71 U.S. 475 (1866)).

Similarly, in light of the Speech and Debate Clause of the Constitution, Art. I, § 6, cl. 1, the federal courts lack jurisdiction to issue orders directing Congress to enact or amend legislation. *See Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 503 (1975). Because the words that amended the Pledge were enacted into law by statute, the district court may not direct Congress to delete those words any more than it may order the President to take such action. All this, of course, is aside from the fact that the President has no authority to amend a statute or declare a law unconstitutional, those functions being reserved to Congress and the federal judiciary respectively.

Newdow nevertheless argues that because the 1954 Act violates the Establishment Clause, Congress should not be protected by the Speech and Debate Clause. This argument misses the jurisdictional, or separation of powers, point. As the Court held in *Eastland*, in determining whether or not the acts of members of Congress are protected by the Speech and Debate Clause, the court looks solely to whether or not the acts fall within the legitimate legislative sphere; if they do, Congress is protected by the absolute prohibition of the Clause against being "questioned in any other Place." *Id.* at 501. "If the mere allegation that a valid legislative act was undertaken for an unworthy purpose would lift the protection of the Clause, then the Clause simply would not provide the protection historically undergirding it." *Id.* at 508-09.

B. The State of California as a defendant

The State of California did not join in the motion to dismiss or otherwise participate in the district court proceedings. It did, however, *sub silentio*, receive the benefit of the district court's ruling dismissing the complaint. Accordingly, a reversal of the order would result in the reinstatement of the complaint against the state. With respect to the validity of the California statute, however, unlike in the case of the Congressional enactment and the school district policy, no arguments, legal or otherwise, were advanced by the parties in the district court. Thus, we do not address separately the validity of the California statute.

C. Standing

Article III standing is a jurisdictional issue. *See United States* v. *Viltrakis*, 108 F.3d 1159, 1160 (9th Cir. 1997). Accordingly, it "may be raised at any stage of

the proceedings, including for the first time on appeal." *See A-Z Intern.* v. *Phillips*, 179 F.3d 1187, 1190-91 (9th Cir. 1999). To satisfy standing requirements, a plaintiff must prove that "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (citing *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)).

Newdow has standing as a parent to challenge a practice that interferes with his right to direct the religious education of his daughter. "Parents have a right to direct the religious upbringing of their children and, on that basis, have standing to protect their right." *Doe* v. *Madison Sch. Dist. No. 321*, 177 F.3d 789, 795 (9th Cir. 1999) (en banc); *see also Grove* v. *Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1532 (9th Cir. 1985) ("Appellants have standing to challenge alleged violations of the establishment clause of the First Amendment if they are directly affected by use of [the challenged book] in the English curriculum. [Appellant] has standing as a parent whose right to direct the religious training of her child is allegedly affected.") (citation omitted).

Newdow has standing to challenge the EGUSD's policy and practice regarding the recitation of the Pledge because his daughter is currently enrolled in elementary school in the EGUSD. However, Newdow has no standing to challenge the SCUSD's policy and practice because his daughter is not currently a student

there. The SCUSD and its superintendent have not caused Newdow or his daughter an "injury in fact" that is "actual or imminent, not conjectural or hypothetical." *Laidlaw*, 528 U.S. at 180 (citing *Lujan*, 504 U.S. at 560-561).

D. Establishment Clause

The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion," U.S. Const. Amend. I, a provision that "the Fourteenth Amendment makes applicable with full force to the States and their school districts." *Lee* v. *Weisman*, 505 U.S. 577, 580 (1992). Over the last three decades, the Supreme Court has used three interrelated tests to analyze alleged violations of the Establishment Clause in the realm of public education: the three-prong test set forth in *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-13 (1971); the "endorsement" test, first articulated by Justice O'Connor in her concurring opinion in *Lynch* v. *Donnelly*, 465 U.S. 668 (1984), and later adopted by a majority of the Court in *County of Allegheny* v. *ACLU*, 492 U.S. 573 (1989); and the "coercion" test first used by the Court in *Lee*.

In 1971, in the context of unconstitutional state aid to nonpublic schools, the Supreme Court in *Lemon* set forth the following test for evaluating alleged Establishment Clause violations. To survive the "*Lemon* test," the government conduct in question (1) must have a secular purpose, (2) must have a principal or primary effect that neither advances nor inhibits religion, and (3) must not foster an excessive government entanglement with religion. *Lemon*, 403 U.S. at 612-13. The Supreme Court applied the *Lemon* test to

every Establishment case it decided between 1971 and 1984, with the exception of *Marsh* v. *Chambers*, 463 U.S. 783 (1983), the case upholding legislative prayer.[3] *See Wallace*, 472 U.S. at 63 (Powell, J., concurring).

In the 1984 *Lynch* case, which upheld the inclusion of a nativity scene in a city's Christmas display, Justice O'Connor wrote a concurring opinion in order to suggest a "clarification" of Establishment Clause jurisprudence. 465 U.S. at 687 (O'Connor, J., concurring).

Justice O'Connor's "endorsement" test effectively collapsed the first two prongs of the *Lemon* test:

> The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions . . . . The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.

Id. at 687-88 (O'Connor, J., concurring).

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[3] In *Marsh*, the Court "held that the Nebraska Legislature's practice of opening each day's session with a prayer by a chaplain paid by the State did not violate the Establishment Clause of the First Amendment. [The] holding was based upon the historical acceptance of the practice that had become 'part of the fabric of our society.'" *Wallace*, 472 U.S. at 63 n. 4 (Powell, J., concurring) (quoting *Marsh*, 463 U.S. at 792).

The Court formulated the "coercion test" when it held unconstitutional the practice of including invocations and benedictions in the form of "nonsectarian" prayers at public school graduation ceremonies. *Lee*, 505 U.S. at 599. Declining to reconsider the validity of the *Lemon* test, the Court in *Lee* found it unnecessary to apply the *Lemon* test to find the challenged practices unconstitutional. *Id.* at 587. Rather, it relied on the principle that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise to act in a way which establishes a state religion or religious faith, or tends to do so." *Id.* (citations and internal quotation marks omitted). The Court first examined the degree of school involvement in the prayer, and found that "the graduation prayers bore the imprint of the State and thus put school-age children who objected in an untenable position." *Id.* at 590. The next issue the Court considered was "the position of the students, both those who desired the prayer and she who did not." *Id.* Noting that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools," *id.* at 592, the Court held that the school district's supervision and control of the graduation ceremony put impermissible pressure on students to participate in, or at least show respect during, the prayer, *id.* at 593. The Court concluded that primary and secondary school children may not be placed in the dilemma of either participating in a religious ceremony or protesting. *Id.* at 594.

Finally, in its most recent school prayer case, the Supreme Court applied the *Lemon* test, the endorsement test, and the coercion test to strike down a school

district's policy of permitting student-led "invocations" before high school football games. *See Santa Fe*, 530 U.S. at 310-16. Citing *Lee*, the Court held that "the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship." *Id.* at 312. Applying the *Lemon* test, the Court found that the school district policy was facially unconstitutional because it did not have a secular purpose. *Id.* at 314-16. The Court also used language associated with the endorsement test. *Id.* at 315 ("[T]his policy was implemented with the purpose of endorsing school prayer."); *id.* at 317 ("Government efforts to endorse religion cannot evade constitutional reproach based solely on the remote possibility that those attempts may fail.").

We are free to apply any or all of the three tests, and to invalidate any measure that fails any one of them. Because we conclude that the school district policy impermissibly coerces a religious act and accordingly hold the policy unconstitutional, we need not consider whether the policy fails the endorsement test or the *Lemon* test as well.

In the context of the Pledge, the statement that the United States is a nation "under God" is a profession of a religious belief, namely, a belief in monotheism. The recitation that ours is a nation "under God" is not a mere acknowledgment that many Americans believe in a deity. Nor is it merely descriptive of the undeniable historical significance of religion in the founding of the Republic. Rather, the phrase "one nation under God" in the context of the Pledge is normative. To recite the Pledge is not to describe the United States; instead, it is to swear allegiance to the values for which the flag stands: unity, indivisibility, liberty, justice, and—since

1954—monotheism. A profession that we are a nation "under God" is identical, for Establishment Clause purposes, to a profession that we are a nation "under Jesus," a nation "under Vishnu," a nation "under Zeus," or a nation "under no god," because none of these professions can be neutral with respect to religion. The school district's practice of teacher-led recitation of the Pledge aims to inculcate in students a respect for the ideals set forth in the Pledge, including the religious values it incorporates.

The Supreme Court recognized the normative and ideological nature of the Pledge in *Barnette*, 319 U.S. 624. There, the Court held unconstitutional a school district's wartime policy of punishing students who refused to recite the Pledge and salute the flag. *Id.* at 642. The Court noted that the school district was compelling the students "to declare a belief," *id.* at 631, and "requir[ing] the individual to communicate by word and sign his acceptance of the political ideas [the flag] . . . bespeaks," *id.* at 633. "[T]he compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind." *Id.* The Court emphasized that the political concepts articulated in the Pledge[4] were idealistic, not descriptive: "'[L]iberty and justice for all,' if it must be accepted as descriptive of the present order rather than an ideal, might to some seem an overstatement." *Id.* at 634 n.14. The Court concluded that: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force

[4] *Barnette* was decided before "under God" was added, and thus the Court's discussion was limited to the political ideals contained in the Pledge.

citizens to confess by word or act their faith therein." *Id.* at 642.

The school district's policy here, like the school's action in *Lee*, places students in the untenable position of choosing between participating in an exercise with religious content or protesting. The defendants argue that the religious content of "one nation under God" is minimal. To an atheist or a believer in non-Judeo-Christian religions or philosophies, however, this phrase may reasonably appear to be an attempt to enforce a "religious orthodoxy" of monotheism, and is therefore impermissible. As the Court observed with respect to the graduation prayer in *Lee*: "What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the non-believer or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy." *Lee*, 505 U.S. at 592.

The coercive effect of the policy here is particularly pronounced in the school setting given the age and impressionability of schoolchildren, and their understanding that they are required to adhere to the norms set by their school, their teacher and their fellow students.[5] Furthermore, under *Lee*, non-compulsory participation is no basis for distinguishing Barnette [*sic*] from the case at bar because, even without a

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[5] The "subtle and indirect" social pressure which permeates the classroom also renders more acute the message sent to non-believing school-children that they are outsiders. *See Lee*, 505 U.S. at 592-93 (stating that "the risk of indirect coercion" from prayer exercises is particularly "pronounced" in elementary and secondary public school because students are subjected to peer pressure and public pressure which is "as real as any overt compulsion").

recitation requirement for each child, the mere presence in the classroom every day as peers recite the statement "one nation under God" has a coercive effect.[6] The coercive effect of the Pledge is also made even more apparent when we consider the legislative history of the Act that introduced the phrase "under God." These words were designed to be recited daily in school classrooms. President Eisenhower, during the Act's signing ceremony, stated: "From this day forward, the millions of our school children will daily proclaim in every city and town, every village and rural schoolhouse, the dedication of our Nation and our people to the Almighty." 100 Cong. Rec. 8618 (1954) (statement of Sen. Ferguson incorporating signing statement of President Eisenhower).[7] All in all, there can be little doubt that under the controlling Supreme

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[6] The objection to the Pledge in *Barnette*, like in the case at bar, was based upon a religious ground. The Pledge in the classroom context imposes upon schoolchildren the constitutionally unacceptable choice between participating and protesting. Recognizing the severity of the effect of this form of coercion on children, the Supreme Court in *Lee* stated, "the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position." 505 U.S. at 593.

[7] In addition, the legislative history of the 1954 Act makes it plain that the sponsors of the amendment knew about and capitalized on the state laws and school district rules that mandate recitation of the Pledge. The legislation's House sponsor, Representative Louis C. Rabaut, testified at the Congressional hearing that "the children of our land, in the daily recitation of the pledge in school, will be daily impressed with a true understanding of our way of life and its origins." This statement was incorporated into the report of the House Judiciary Committee. H.R. Rep. No. 83-1693, at 3 (1954), *reprinted in* 1954 U.S.C.C.A.N 2339, 2341.

Court cases the school district's policy fails the coercion test.[8]

The Supreme Court has addressed the Pledge in passing, and we owe due deference to its dicta. *See United States* v. *Baird*, 85 F.3d 450, 453 (9th Cir. 1996). Our opinion, however, is not inconsistent with this dicta. In *Allegheny*, the Court noted that it had "considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief." 492 U.S. at 602-03. And in *Lynch*, the Court observed that students recited the pledge daily, but only to support its point that there is a long tradition of "official acknowledgment" of religion. 465 U.S. at 674, 676. Neither of these two references speaks to the issue here. We may assume *arguendo* that public officials do not unconstitutionally endorse religion when they recite the Pledge, yet it does not follow that schools may coerce impressionable young schoolchildren to recite it, or even to stand mute while it is being recited by their classmates.

Our decision is not inconsistent with *Engel*, which approved of encouraging students to "recit[e] historical documents such as the Declaration of Independence

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[8] In *Aronow* v. *United States*, 432 F.2d 242 (9th Cir. 1970), this court, without reaching the question of standing, upheld the inscription of the phrase "In God We Trust" on our coins and currency. *But cf. Wooley* v. *Maynard*, 430 U.S. 705, 722 (1977) (Rehnquist, J., dissenting) (stating that the majority's holding leads logically to the conclusion that "In God We Trust" is an unconstitutional affirmation of belief). In any event, *Aronow* is distinguishable in many ways from the present case. The most important distinction is that school children are not coerced into reciting or otherwise actively led to participating in an endorsement of the markings on the money in circulation.

which contain references to the Deity or . . . sing[ ] officially espoused anthems which include the composer's professions of faith in a Supreme Being." 370 U.S. at 435 n.21. The Pledge differs from the Declaration and the anthem in that its reference to God, in textual and historical context, is not merely a reflection of the author's profession of faith. It is, by design, an affirmation by the person reciting it. "I pledge" is a performative statement. *See* J.L. Austin, *How to Do Things with Words* (J.O. Urmsson & Marina Sbisa eds., Harvard Univ. Press 1975) (1962). To pledge allegiance to something is to alter one's moral relationship to it, and not merely to repeat the words of an historical document or anthem.

The only other United States Court of Appeals to consider the issue is the Seventh Circuit, which held in *Sherman* v. *Community Consolidated School District 21*, 980 F.2d 437 (7th Cir. 1992), that a policy similar to the one before us regarding the recitation of the Pledge of Allegiance containing the words "one nation under God" was constitutional. The *Sherman* court first stated that:

> If as *Barnette* holds no state may require anyone to recite the Pledge, and if as the prayer cases hold the recitation by a teacher or rabbi of unwelcome words is coercion, then the Pledge of Allegiance becomes unconstitutional under all circumstances, just as no school may read from a holy scripture at the start of class.

980 F.2d at 444. It then concludes, however, that this reasoning is flawed because the First Amendment "[does] not establish general rules about speech or schools; [it] call[s] for religion to be treated differently."

Id. We have some difficulty understanding this statement; we do not believe that the Constitution prohibits compulsory patriotism as in *Barnette*, but permits compulsory religion as in this case. If government-endorsed religion is to be treated differently from government-endorsed patriotism, the treatment must be less favorable, not more.

The Seventh Circuit makes an even more serious error, however. It not only refuses to apply the *Lemon* test because of the Supreme Court's criticism of that test in *Lee*, but it also fails to apply the coercion test from *Lee*. Circuit courts are not free to ignore Supreme Court precedent in this manner. *Rodriguez de Quijas* v. *Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). Instead of applying any of the tests announced by the Supreme Court, the Seventh Circuit simply frames the question as follows: "Must ceremonial references in civic life to a deity be understood as prayer, or support for all monotheistic religions, to the exclusion of atheists and those who worship multiple gods?" 980 F.2d at 445. For the reasons we have already explained, this question is simply not dispositive of whether the school district policy impermissibly coerces a religious act.

In light of Supreme Court precedent, we hold that the school district's policy and practice of teacher-led recitation of the Pledge, with the inclusion of the added words "under God," violates the Establishment Clause.

In addition to the relief that Newdow seeks against the school district—relief to which he is entitled—Newdow seeks a declaration as to the constitutionality of the 1954 Act. The district court did not discuss that question because it dismissed Newdow's complaint on the basis of its holding that the school district's policy did not violate the First Amendment. Given our contrary holding, we must consider whether to grant Newdow's claim for declaratory relief as to the Act. Normally, whether to decide a claim for declaratory judgment is left to the discretion of the district court. 28 U.S.C. § 2201(a); *see also Government Employees Ins. Co.* v. *Dizol*, 133 F.3d 1220, 1222-23 (9th Cir. 1998). We doubt that, given the relief to which we decide Newdow is entitled, the district court would have exercised its discretionary power to resolve, in the present case, the additional issue as to which Newdow seeks declaratory relief. Accordingly, we decline to reach that issue here.

The judgment of dismissal is vacated with respect to Newdow's claim that the school district's Pledge policy violates the Establishment Clause and the cause is remanded for further proceedings consistent with our holding. Plaintiff is to recover costs on this appeal.

REVERSED and REMANDED.

FERNANDEZ, Circuit Judge, concurring and dissenting:

I concur in parts A, B and C of the majority opinion, but dissent as to part D.

We are asked to hold that inclusion of the phrase "under God" in this nation's Pledge of Allegiance violates the religion clauses of the Constitution of the United States. We should do no such thing. We should, instead, recognize that those clauses were not designed to drive religious expression out of public thought; they were written to avoid discrimination.[1]

We can run through some or all of the tests and concepts which have floated to the surface from time to time. Were we to do so, the one that appeals most to me, the one I think to be correct, is the concept that what the religion clauses of the First Amendment require is neutrality; that those clauses are, in effect, an early kind of equal protection provision and assure that government will neither discriminate for nor discriminate against a religion or religions. *See Gentala* v. *City of Tucson*, 244 F.3d 1065, 1083-86 (9th Cir.) (en banc) (Fernandez, J., dissenting), *cert. granted and judgment vacated by* 534, U.S. 946, 122 S. Ct. 340, 151 L. Ed. 2d 256 (2001); *Goehring* v. *Brophy*, 94 F.3d 1294, 1306-07 (9th Cir. 1996) (Fernandez, J., concurring). But, legal world abstractions and ruminations aside, when all is said and done, the danger that "under God" in our

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[1] Although the majority now formally limits itself to holding that it is unconstitutional to recite the Pledge in public classrooms, its message that something is constitutionally infirm about the Pledge itself abides and remains a clear and present danger to all similar public expressions of reverence. At the very least, it deprives children in public schools of the benefits derived from those expressions.

Pledge of Allegiance will tend to bring about a theocracy or suppress somebody's beliefs is so minuscule as to be de minimis. The danger that phrase presents to our First Amendment freedoms is picayune at most.

Judges, including Supreme Court Justices, have recognized the lack of danger in that and similar expressions for decades, if not for centuries, as have presidents[2] and members of our Congress. *See, e.g.*, *County of Allegheny* v. *ACLU*, 492 U.S. 573, 602-03, 672-73, 109 S. Ct. 3086, 3106, 3143, 106 L. Ed. 2d 472 (1989); *Wallace* v. *Jaffree*, 472 U.S. 38, 78 n.5, 105 S. Ct. 2479, 2501 n.5, 86 L. Ed. 2d 29 (1985); *Lynch* v. *Donnelly*, 465 U.S. 668, 676, 693, 716, 104 S. Ct. 1355, 1361, 1369, 1382, 79 L. Ed. 2d 604 (1984); *Abington Sch. Dist.* v. *Schempp*, 374 U.S. 203, 306-08, 83 S. Ct. 1560, 1615-16, 10 L. Ed. 2d 844 (1963);[3] *Separation of Church & State Comm.* v. *City of Eugene*, 93 F.3d 617, 622 (9th Cir. 1996) (O'Scannlain, J., concurring); *Gaylor* v. *United States*, 74 F.3d 214, 217-18 (10th Cir. 1996); *Sherman* v. *Cmty Consol. Sch. Dist. 21*, 980 F.2d 437, 445-48 (7th Cir. 1992); *O'Hair* v. *Murray*, 588 F.2d 1144, 1144 (5th Cir. 1978) (per curiam); *Aronow* v. *United State*s, 432 F.2d 242, 243-44 (9th Cir. 1970); *cf. Marsh* v.

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[2] *See, e.g.*, *Lee* v. *Weisman*, 505 U.S. 577, 632-35, 112 S. Ct. 2649, 2679-80, 120 L. Ed. 2d 467 (1992) (Scalia, J., dissenting).

[3] The citations to the four preceding Supreme Court opinions are to majority opinions, concurring opinions, and dissents. Because my point is that a number of Justices have recognized the lack of danger and because I hope to avoid untoward complication in the setting out of the citations, I have not designated which Justices have joined in which opinion. All in all, however, perusing those opinions indicates that Chief Justice Burger, Chief Justice Rehnquist, and Justices Harlan, Brennan, White, Goldberg, Marshall, Blackmun, Powell, Stevens, O'Connor, Scalia, and Kennedy have so recognized.

Chambers, 463 U.S. 783, 795, 103 S. Ct. 3330, 3338, 77 L. Ed. 2d 1019 (1983) (legislative prayer). I think it is worth stating a little more about two of the cases which I have just cited. In *County of Allegheny*, 492 U.S. at 602-03, 109 S. Ct. at 3106, the Supreme Court had this to say: "Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief." The Seventh Circuit, reacting in part to that statement, has wisely expressed the following thought:

> Plaintiffs observe that the Court sometimes changes its tune when it confronts a subject directly. True enough, but an inferior court had best respect what the majority says rather than read between the lines. If the Court proclaims that a practice is consistent with the establishment clause, we take its assurances seriously. If the Justices are just pulling our leg, let them say so.

Sherman, 980 F.2d at 448.

Some, who rather choke on the notion of de minimis, have resorted to the euphemism "ceremonial deism." *See, e.g.*, *Lynch*, 465 U.S. at 716, 104 S. Ct. at 1382 (Brennan, J., dissenting). But whatever it is called (I care not), it comes to this: such phrases as "In God We Trust," or "under God" have no tendency to establish a religion in this country or to suppress anyone's exercise, or non-exercise, of religion, except in the fevered eye of persons who most fervently would like to drive all tincture of religion out of the public life of our polity. Those expressions have not caused any real harm of that sort over the years since 1791, and are not likely to

do so in the future.[4] As I see it, that is not because they are drained of meaning.[5] Rather, as I have already indicated, it is because their tendency to establish religion (or affect its exercise) is exiguous. I recognize that some people may not feel good about hearing the phrases recited in their presence, but, then, others might not feel good if they are omitted. At any rate, the Constitution is a practical and balanced charter for the just governance of a free people in a vast territory. Thus, although we do feel good when we contemplate the effects of its inspiring phrasing and majestic promises, it is not primarily a feel-good prescription.[6] In *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 630, 642, 63 S. Ct. 1178, 1181, 1187, 87 L. Ed. 1628 (1943), for example, the Supreme Court did not say that the Pledge could not be recited in the presence of Jehovah's Witness children; it merely said that they did not have to recite it.[7] That fully protected their con-

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[4] They have not led us down the long path to kulturkampf or worse. Those who are somehow beset by residual doubts and fears should find comfort in the reflection that no baleful religious effects have been generated by the existence of similar references to a deity throughout our history. More specifically, it is difficult to detect any signs of incipient theocracy springing up since the Pledge was amended in 1954.

[5] *See also Sherman*, 980 F.2d at 448 (Manion, J., concurring) ("A civic reference to God does not become permissible . . . only when . . . it is sapped of religious significance." The Pledge is constitutional and "[w]e need not drain the meaning from the reference [to God] to reach this conclusion."

[6] We, by the way, indicated as much in *American Family Ass'n, Inc.* v. *City and County of San Francisco*, 277 F.3d 1114, 1125-26 (9th Cir. 2002), which involved governmental conduct that was much more questionable than adoption of the phrase "under God." *See id.* at 1126-28 (Noonan, J., dissenting).

[7] I recognize that the Pledge did not then contain the phrase "under God."

stitutional rights by precluding the government from trenching upon "the sphere of intellect and spirit." *Id.* at 642, 63 S. Ct. at 1187. As the Court pointed out, their religiously based refusal "to participate in the ceremony [would] not interfere with or deny rights of others to do so." *Id.* at 630, 63 S. Ct. at 1181. We should not permit Newdow's feel-good concept to change that balance.

My reading of the stelliscript suggests that upon Newdow's theory of our Constitution, accepted by my colleagues today, we will soon find ourselves prohibited from using our album of patriotic songs in many public settings. "God Bless America" and "America The Beautiful" will be gone for sure, and while use of the first three stanzas of "The Star Spangled Banner" will still be permissible, we will be precluded from straying into the fourth.[8] And currency beware! Judges can accept those results if they limit themselves to elements and tests, while failing to look at the good sense and principles that animated those tests in the first place. But they do so at the price of removing a vestige of the awe all of us, including our children, must feel at the immenseness of the universe and our own small place within it, as well as the wonder we must feel at the good fortune of our country. That will cool the febrile nerves of a few at the cost of removing the healthy glow conferred upon many citizens when the forbidden verses, or phrases, are uttered, read, or seen.

In short, I cannot accept the eliding of the simple phrase "under God" from our Pledge of Allegiance in any setting, when it is obvious that its tendency to

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[8] Nor will we be able to stray into the fourth stanza of "My Country 'Tis of Thee" for that matter.

establish religion in this country or to interfere with the free exercise (or non-exercise) of religion is de minimis.[9]

Thus, I respectfully concur in part and dissent in part.

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[9] Lest I be misunderstood, I must emphasize that to decide this case it is not necessary to say, and I do not say, that there is such a thing as a de minimis constitutional violation. What I do say is that the de minimis tendency of the Pledge to establish a religion or to interfere with its free exercise is no constitutional violation at all. By the way, I am not the first to apply the de minimis concept to this area of the law. *See, e.g.*, *Mitchell* v. *Helms*, 530 U.S. 793, 861, 120 S. Ct. 2530, 2569, 147 L. Ed. 2d 660 (2000) (O'Connor, J., concurring) (evidence of improper use of funds was de minimis and did not affect constitutional inquiry); *Lee* v. *Weisman*, 505 U.S. 577, 630-31, 112 S. Ct. 2649, 2678, 120 L. Ed. 2d 467 (1992) (Souter, J. concurring) (establishment case; Madison recognized there is a difference between trivial and serious in constitutional practice, and pointed to the legal aphorism de minimis); *Lynch* v. *Donnelly*, 465 U.S. 668, 678, 104 S. Ct. 1355, 1361-62, 79 L. Ed. 2d 604 (1984) (not all government conduct which gives special recognition to religion is unconstitutional; where the benefit is indirect or remote, it is not unconstitutional); *School District of Abington* v. *Schempp*, 374 U.S. 203, 308, 83 S. Ct. 1560, 1616, 10 L. Ed. 2d 844 (1963) (Goldburg, J., concurring) ("the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow."); *Rapier* v. *Harris*, 172 F.3d 999, 1006 n.4 (7th Cir. 1999) ("De minimis burdens on free exercise are not of constitutional dimension); *Van Zandt* v. *Thompson*, 839 F.2d 1215, 1222 (7th Cir. 1988) (legislative prayer room would have a de minimis effect on advancement of religion); *Walsh* v. *La. High Sch. Athletic Ass'n*, 616 F.2d 152, 158 (5th Cir. 1980) (de minimis burden on free exercise results in rejection of First Amendment challenge); *Marsa* v. *Wernik*, 430 A.2d 888, 899 (N.J. 1981) (in an establishment case where impact of practice de minimis, it is unobjectionable); *see also Peck* v. *Upshur County Bd. of Educ.*, 155 F.3d 274, 288-89 (4th Cir. 1998) (if a genuine threat of establishing religion becomes apparent, it is soon enough to address the issue).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-16423
D.C. No. CV 00-00495-MLS/PAN

MICHAEL A. NEWDOW, PLAINTIFF-APPELLANT

v.

U.S. CONGRESS; UNITED STATES OF AMERICA; WILLIAM JEFFERSON CLINTON, PRESIDENT OF THE UNITED STATES; STATE OF CALIFORNIA; ELK GROVE UNIFIED SCHOOL DISTRICT; DAVID W. GORDON, SUPERINTENDENT EGUSD; SACRAMENTO CITY UNIFIED SCHOOL DISTRICT; JIM SWEENEY, SUPERINTENDENT SCUSD, DEFENDANTS-APPELLEES

Appeal from the United States District Court for the Eastern District of California, Milton J. Schwartz, Senior Judge, Presiding

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Argued and Submitted: March 14, 2002
Filed: June 26, 2002

Before: GOODWIN, REINHARDT and FERNANDEZ, Circuit Judges.

Partial Concurrence and Partial Dissent by Judge FERNANDEZ.

OPINION

GOODWIN, Circuit Judge:

Michael Newdow appeals a judgment dismissing his challenge to the constitutionality of the words "under God" in the Pledge of Allegiance to the Flag. Newdow argues that the addition of these words by a 1954 federal statute to the previous version of the Pledge of Allegiance (which made no reference to God) and the daily recitation in the classroom of the Pledge of Allegiance, with the added words included, by his daughter's public school teacher are violations of the Establishment Clause of the First Amendment to the United States Constitution.

FACTUAL AND PROCEDURAL BACKGROUND

Newdow is an atheist whose daughter attends public elementary school in the Elk Grove Unified School District ("EGUSD") in California. In accordance with state law and a school district rule, EGUSD teachers begin each school day by leading their students in a recitation of the Pledge of Allegiance ("the Pledge"). The California Education Code requires that public schools begin each school day with "appropriate patriotic exercises" and that "[t]he giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy" this requirement. Cal. Educ. Code § 52720

(1989) (hereinafter "California statute").[1] To implement the California statute, the school district that Newdow's daughter attends has promulgated a policy that states, in pertinent part: "Each elementary school class [shall] recite the pledge of allegiance to the flag once each day."[2]

The classmates of Newdow's daughter in the EGUSD are led by their teacher in reciting the Pledge codified in federal law. On June 22, 1942, Congress first codified the Pledge as "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all." Pub. L. No. 623, Ch. 435, § 7, 56 Stat. 380 (1942) (codified at 36 U.S.C. § 1972). On June 14, 1954, Congress amended Section 1972 to add the words "under God" after the word "Nation." Pub. L. No. 396, Ch. 297, 68 Stat. 249 (1954) ("1954 Act"). The Pledge is currently codified as "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with

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[1] The relevant portion of California Education Code § 52720 reads:

> In every public elementary school each day during the school year at the beginning of the first regularly scheduled class or activity period at which the majority of the pupils of the school normally begin the schoolday, there shall be conducted appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section.

[2] The SCUSD, the school district that Newdow claims his daughter may in the future attend, has promulgated a similar rule: "Each school shall conduct patriotic exercises daily. . . . The Pledge of Allegiance to the flag will fulfill this requirement." However, as discussed *infra*, Newdow lacks standing to challenge the SCUSD's rule requiring recitation of the Pledge.

liberty and justice for all." 4 U.S.C. § 4 (1998) (Title 36 was revised and recodified by Pub. L. No. 105-225, § 2(a), 112 Stat. 1494 (1998). Section 172 was abolished, and the Pledge is now found in Title 4.)

Newdow does not allege that his daughter's teacher or school district requires his daughter to participate in reciting the Pledge.[3] Rather, he claims that his daughter is injured when she is compelled to "watch and listen as her state-employed teacher in her state-run school leads her classmates in a ritual proclaiming that there is a God, and that our's [sic] is 'one nation under God.'"

Newdow's complaint in the district court challenged the constitutionality, under the First Amendment, of the 1954 Act, the California statute, and the school district's policy requiring teachers to lead willing students in recitation of the Pledge. He sought declaratory and injunctive relief, but did not seek damages.

The school districts and their superintendents (collectively, "school district defendants") filed a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss for failure to state a claim. Magistrate Judge Peter A. Nowinski held a hearing at which the school district defendants requested that the court rule only on the constitutionality of the Pledge, and defer any ruling on sover-

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[3] Compelling students to recite the Pledge was held to be a First Amendment violation in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 642, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943) ("[T]he action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."). *Barnette* was decided before the 1954 Act added the words "under God" to the Pledge.

eign immunity. The United States Congress, the United States, and the President of the United States (collectively, "the federal defendants") joined in the motion to dismiss filed by the school district defendants. The magistrate judge reported findings and a recommendation; District Judge Edward J. Schwartz approved the recommendation and entered a judgment of dismissal. This appeal followed.

DISCUSSION

A. Jurisdiction

Newdow asks the district court to order the President of the United States ("the President") to "alter, modify or repeal" the Pledge by removing the words "under God"; and to order the United States Congress ("Congress") "immediately to act to remove the words 'under God' from the Pledge." The President, however, is not an appropriate defendant in an action challenging the constitutionality of a federal statute. *See Franklin v. Massachusetts*, 505 U.S. 788, 802-03, 112 S. Ct. 2767, 120 L.Ed.2d 636 (1992) (plurality) (observing that a court of the United States " 'has no jurisdiction of a bill to enjoin the President in the performance of his official duties' ") (quoting *Mississippi v. Johnson*, 71 U.S. 475, 501, 18 L.Ed. 437 (1866)).

Similarly, in light of the Speech and Debate Clause of the Constitution, Art. I, § 6, cl. 1, the federal courts lack jurisdiction to issue orders directing Congress to enact or amend legislation. *See Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503, 95 S. Ct. 1813, 44 L.Ed.2d 324 (1975). Because the words that amended the Pledge were enacted into law by statute, the district court may not direct Congress to delete those words any more than it may order the President to take

such action. All this, of course, is aside from the fact that the President has no authority to amend a statute or declare a law unconstitutional, those functions being reserved to Congress and the federal judiciary respectively.

Newdow nevertheless argues that because the 1954 Act violates the Establishment Clause, Congress should not be protected by the Speech and Debate Clause. This argument misses the jurisdictional, or separation of powers, point. As the Court held in *Eastland*, in determining whether or not the acts of members of Congress are protected by the Speech and Debate Clause, the court looks solely to whether or not the acts fall within the legitimate legislative sphere; if they do, Congress is protected by the absolute prohibition of the Clause against being "questioned in any other Place." *Id.* at 501. "If the mere allegation that a valid legislative act was undertaken for an unworthy purpose would lift the protection of the Clause, then the Clause simply would not provide the protection historically undergirding it." *Id.* at 508-09, 95 S. Ct. 1813. Although the district court lacks jurisdiction over the President and the Congress, the question of the constitutionality of the 1954 Act remains before us. While the court correctly dismissed the claim against those parties, it survives against others.

B. The State of California as a defendant

The State of California did not join in the motion to dismiss or otherwise participate in the district court proceedings. It did, however, *sub silentio*, receive the benefit of the district court's ruling dismissing the complaint. Accordingly, a reversal of the order would result in the reinstatement of the complaint against the state. With respect to the validity of the California

statute, however, unlike in the case of the Congressional enactment and the school district policy, no arguments, legal or otherwise, were advanced by the parties either below or here. Thus, we do not address separately the validity of the California statute.

C. Standing

Article III standing is a jurisdictional issue. *See United States v. Viltrakis*, 108 F.3d 1159, 1160 (9th Cir. 1997). Accordingly, it "may be raised at any stage of the proceedings, including for the first time on appeal." *See A-Z Intern. v. Phillips*, 179 F.3d 1187, 1190-91 (9th Cir. 1999). To satisfy standing requirements, a plaintiff must prove that "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L.Ed.2d 610 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561, 112 S. Ct. 2130, 119 L.Ed.2d 351 (1992)).

Newdow has standing as a parent to challenge a practice that interferes with his right to direct the religious education of his daughter. "Parents have a right to direct the religious upbringing of their children and, on that basis, have standing to protect their right." *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 795 (9th Cir. 1999) (en banc); *see also Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1532 (9th Cir. 1985) ("Appellants have standing to challenge alleged violations of the establishment clause of the First Amendment if they are directly affected by use of [the challenged book] in

the English curriculum. [Appellant] has standing as a parent whose right to direct the religious training of her child is allegedly affected.") (citation omitted).

Newdow has standing to challenge the EGUSD's policy and practice regarding the recitation of the Pledge because his daughter is currently enrolled in elementary school in the EGUSD. However, Newdow has no standing to challenge the SCUSD's policy and practice because his daughter is not currently a student there. The SCUSD and its superintendent have not caused Newdow or his daughter an "injury in fact" that is "actual or imminent, not conjectural or hypothetical." *Laidlaw*, 528 U.S. at 180, 120 S. Ct. 693 (citing *Lujan*, 504 U.S. at 560- 561, 112 S. Ct. 2130).

The final question of standing relates to the 1954 Act. Specifically, has Newdow suffered an "injury in fact" that is "fairly traceable" to the enactment of the 1954 Act? *Id.*

We begin our inquiry by noting the general rule that the standing requirements for an action brought under the Establishment Clause are the same as for any other action. *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 488-90, 102 S. Ct. 752, 70 L.Ed.2d 700 (1982). "The requirement of standing focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. Moreover, we know of no principled basis on which to create a hierarchy of constitutional values or a complementary 'sliding scale' of standing which might permit respondents to invoke the judicial power of the United States." *Id.* at 484, 102 S. Ct. 752 (citation and internal quotation marks omitted). In *Valley Forge*, an organization dedicated to the separation of church and state

brought suit challenging the federal government's grant of surplus federal property to a church-related college. The suit alleged that this grant of real property, without any financial payment by the college, was a violation of the Establishment Clause. The Supreme Court found that the plaintiff had standing neither as a taxpayer, *see id.* at 479-80, 102 S. Ct. 752, nor as a party personally injured as a consequence of the alleged unconstitutional action, *see id.* at 484-86, 102 S. Ct. 752. The "psychological consequence presumably produced by observation of conduct with which one disagrees . . . . is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms." *Id.* at 485-86, 102 S. Ct. 752. The Court emphasized that "'[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.'" *Id.* at 489, 102 S. Ct. 752 (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227, 94 S. Ct. 2925, 41 L.Ed.2d 706 (1974)).

While *Valley Forge* remains good law, the Supreme Court in more recent opinions has indirectly broadened the notion of Establishment Clause standing in public education cases by holding that the mere enactment of a statute may constitute an Establishment Clause violation. In *Wallace v. Jaffree*, 472 U.S. 38, 105 S. Ct. 2479, 86 L.Ed.2d 29 (1985), the Court considered an Establishment Clause challenge to an Alabama statute that originally had authorized a one-minute period of silence in public schools "for meditation," but was later amended to authorize a period of silence "for meditation or voluntary prayer." *Id.* at 40-42, 105 S. Ct. 2479. Although the previous form of the statute specifically allowed students to use the moment of silence for

"meditation," silent prayer was always an option. "[I]t is undisputed that at the time of the enactment of [the amended statute] there was no governmental practice impeding students from silently praying for one minute at the beginning of each schoolday." *Id.* at 57 n.45, 105 S. Ct. 2479. Nor were students, under the amended form of the statute, compelled to use the allotted time for prayer. In sum, the amendment to the Alabama statute had no discernible effect on public school students other than to inform them that the state was encouraging them to engage in prayer during their daily moment of silence. Because the Supreme Court has repeatedly held that standing is a jurisdictional requirement, the existence of which each federal court must determine for itself, *see Lujan*, 504 U.S. at 559-561, 112 S. Ct. 2130; *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-31, 110 S. Ct. 596, 107 L.Ed.2d 603 (1990), we may presume that in *Wallace* the Court examined the standing question before deciding the merits, and that the Court determined that the schoolchildren's parents had standing to challenge the amended Alabama statute.

Our reading of *Wallace* is supported by *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 120 S. Ct. 2266, 147 L.Ed.2d 295 (2000), where the Court upheld a facial challenge to a school district's policy of permitting, but not requiring, prayer initiated and led by a student at high school football games. Noting that "the Constitution also requires that we keep in mind 'the myriad, subtle ways in which the Establishment Clause values can be eroded,'" *id.* at 314, 120 S. Ct. 2266 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 104 S. Ct. 1355, 79 L.Ed.2d 604, 694 (1984) (O'Connor, J., concurring)), the Court held that the "mere passage by

the District of a policy that has the purpose and perception of government establishment of religion," *id.*, violated the Establishment Clause. "[T]he *simple enactment* of this policy, with the purpose and perception of school endorsement of student prayer, was a constitutional violation." *Id.* at 316, 120 S. Ct. 2266 (emphasis added).

In *Wallace* and *Santa Fe*, the Court looked at the language of each statute, the context in which the statute was enacted, and its legislative history to determine that the challenged statute caused an injury in violation of the Establishment Clause. "We refuse to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer." *Id.* at 315, 120 S. Ct. 2266. Justice O'Connor's concurrence in *Wallace* noted that whether a statute actually conveys a message of endorsement of religion is "not entirely a question of fact . . . . The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as state endorsement of prayer in public schools." 472 U.S. at 76, 105 S. Ct. 2479 (O'Connor, J., concurring in judgment). In *Santa Fe*, "[t]he text and history of this policy . . . reinforce our objective student's perception that the prayer is, in actuality, encouraged by the school." 530 U.S. at 308, 120 S. Ct. 2266. In evaluating the purpose of the school district policy, the Court found "most striking . . . the evolution of the current policy." *Id.* at 309, 120 S. Ct. 2266. In *Wallace*, a review of the legislative history led the Court to conclude that enactment of the amended statute "was not motivated by any clearly secular purpose—indeed, the statute had *no* secular purpose."

472 U.S. at 56, 105 S. Ct. 2479; *see also id.* at 57-60, 105 S. Ct. 2479.

Operating within the above-described legal landscape, we now turn to the question initially posed, namely, does Newdow have standing to challenge the 1954 Act? Initially, we note that the 1954 statute challenged by Newdow is similar to the Alabama statute struck down in *Wallace*. Neither statute works the traditional type of "injury in fact" that is implicated when a statute compels or prohibits certain activity, nor do the amendments brought about by these statutes lend themselves to "as-applied" constitutional review. Nevertheless, the Court in *Wallace*, at least implicitly, determined that the schoolchildren's parents had standing to attack the challenged statute. Moreover, the legislative history of the 1954 Act shows that the "under God" language was not meant to sit passively in the federal code unbeknownst to the public; rather, the sponsors of the amendment knew about and capitalized on the state laws and school district rules that mandate recitation of the Pledge. The legislation's House sponsor, Representative Louis C. Rabaut, testified at the Congressional hearing that "the children of our land, in the daily recitation of the pledge in school, will be daily impressed with a true understanding of our way of life and its origins," and this statement was incorporated into the report of the House Judiciary Committee. H.R. Rep. No. 83-1693, at 3 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2339, 2341. Taken within its context, the 1954 addendum was designed to result in the recitation of the words "under God" in school classrooms throughout the land on a daily basis, and therefore constituted as much of an injury-in-fact as the policies considered in *Wallace* and

Santa Fe. As discussed earlier, Newdow has standing as a parent to challenge a practice that interferes with his right to direct the religious education of his daughter. The mere enactment of the 1954 Act in its particular context constitutes a religious recitation policy that interferes with Newdow's right to direct the religious education of his daughter. Accordingly, we hold that Newdow has standing to challenge the 1954 Act.

D. Establishment Clause

The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion," U.S. Const. amend. I, a provision that "the Fourteenth Amendment makes applicable with full force to the States and their school districts." *Lee v. Weisman*, 505 U.S. 577, 580, 112 S. Ct. 2649, 120 L.Ed.2d 467 (1992). Over the last three decades, the Supreme Court has used three interrelated tests to analyze alleged violations of the Establishment Clause in the realm of public education: the three-prong test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S. Ct. 2105, 29 L.Ed.2d 745 (1971); the "endorsement" test, first articulated by Justice O'Connor in her concurring opinion in *Lynch*, and later adopted by a majority of the Court in *County of Allegheny v. ACLU*, 492 U.S. 573, 109 S. Ct. 3086, 106 L.Ed.2d 472 (1989); and the "coercion" test first used by the Court in *Lee*.

In 1971, in the context of unconstitutional state aid to nonpublic schools, the Supreme Court in *Lemon* set forth the following test for evaluating alleged Establishment Clause violations. To survive the "*Lemon* test," the government conduct in question (1) must have a secular purpose, (2) must have a principal or

primary effect that neither advances nor inhibits religion, and (3) must not foster an excessive government entanglement with religion. *Lemon*, 403 U.S. at 612-13, 91 S. Ct. 2105. The Supreme Court applied the *Lemon* test to every Establishment case it decided between 1971 and 1984, with the exception of *Marsh v. Chambers*, 463 U.S. 783, 103 S. Ct. 3330, 77 L.Ed.2d 1019 (1983), the case upholding legislative prayer.[4] *See Wallace*, 472 U.S. at 63, 105 S. Ct. 2479 (Powell, J., concurring).

In the 1984 *Lynch* case, which upheld the inclusion of a nativity scene in a city's Christmas display, Justice O'Connor wrote a concurring opinion in order to suggest a "clarification" of Establishment Clause jurisprudence. 465 U.S. at 687, 104 S. Ct. 1355 (O'Connor, J., concurring). Justice O'Connor's "endorsement" test effectively collapsed the first two prongs of the *Lemon* test:

> The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions. . . . The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are

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[4] In *Marsh*, the Court "held that the Nebraska Legislature's practice of opening each day's session with a prayer by a chaplain paid by the State did not violate the Establishment Clause of the First Amendment. [The] holding was based upon the historical acceptance of the practice that had become 'part of the fabric of our society.'" *Wallace*, 472 U.S. at 63 n.4, 105 S. Ct. 2479 (Powell, J., concurring) (quoting *Marsh*, 463 U.S. at 792, 103 S. Ct. 3330).

> outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.

Id. at 687-88, 91 S. Ct. 2105 (O'Connor, J., concurring).

The Court formulated the "coercion test" when it held unconstitutional the practice of including invocations and benedictions in the form of "nonsectarian" prayers at public school graduation ceremonies. *Lee*, 505 U.S. at 599, 112 S. Ct. 2649. Declining to reconsider the validity of the *Lemon* test, the Court in *Lee* found it unnecessary to apply the *Lemon* test to find the challenged practices unconstitutional. *Id.* at 587, 112 S. Ct. 2649. Rather, it relied on the principle that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise to act in a way which establishes a state religion or religious faith, or tends to do so." *Id.* (citations and internal quotation marks omitted).[5] The Court first examined the degree

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[5] Although this formulation is referred to as the "coercion" test, it should be noted that coercion is not a *necessary* element in finding an Establishment Clause violation. "The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion. . . ." *Engel v. Vitale*, 370 U.S. 421, 430, 82 S. Ct. 1261, 8 L.Ed.2d 601 (1962). "[T]his court has never relied on coercion alone as the touchstone of Establishment Clause analysis. To require a showing of coercion, even indirect coercion, as an essential element of an Establishment Clause violation would make the free Exercise Clause a redundancy." *Allegheny*, 492 U.S. at 628, 109 S. Ct. 3086 (O'Connor, J., concurring). "Over the years, this Court has declared the invalidity of many noncoercive state laws and practices conveying a message of religious endorsement." *Lee*, 505 U.S. at 618, 112 S. Ct. 2649 (Souter, J., concurring).

of school involvement in the prayer, and found that "the graduation prayers bore the imprint of the State and thus put school-age children who objected in an untenable position." *Id.* at 590. The next issue the Court considered was "the position of the students, both those who desired the prayer and she who did not." *Id.* Noting that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools," *id.* at 592, 112 S. Ct. 2649, the Court held that the school district's supervision and control of the graduation ceremony put impermissible pressure on students to participate in, or at least show respect during, the prayer, *id.* at 593, 112 S. Ct. 2649. The Court concluded that primary and secondary school children may not be placed in the dilemma of either participating in a religious ceremony or protesting. *Id.* at 594, 112 S. Ct. 2649.

Finally, in its most recent school prayer case, the Supreme Court applied the *Lemon* test, the endorsement test, and the coercion test to strike down a school district's policy of permitting student-led "invocations" before high school football games. *See Santa Fe*, 530 U.S. at 310-16, 120 S. Ct. 2266. Citing *Lee*, the Court held that "the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship." *Id.* at 312, 120 S. Ct. 2266. Applying the *Lemon* test, the Court found that the school district policy was facially unconstitutional because it did not have a secular purpose. *Id.* at 314-16. The Court also used language associated with the endorsement test. *Id.* at 315, 120 S. Ct. 2266 ("[T]his policy was implemented with the purpose of endorsing school prayer."); *id.* at 317, 120 S. Ct. 2266 ("Govern-

ment efforts to endorse religion cannot evade constitutional reproach based solely on the remote possibility that those attempts may fail.").

We are free to apply any or all of the three tests, and to invalidate any measure that fails any one of them. The Supreme Court has not repudiated *Lemon;* in *Santa Fe*, it found that the application of each of the three tests provided an independent ground for invalidating the statute at issue in that case; and in *Lee*, the Court invalidated the policy solely on the basis of the coercion test. Although this court has typically applied the *Lemon* test to alleged Establishment Clause violations, *see, e.g., Am. Family Ass'n, Inc. v. City and County of San Francisco*, 277 F.3d 1114, 1120-21 (9th Cir. 2002), we are not required to apply it if a practice fails one of the other tests. Nevertheless, for purposes of completeness, we will analyze the school district policy and the 1954 Act under all three tests.

We first consider whether the 1954 Act and the EGUSD's policy of teacher-led Pledge recitation survive the endorsement test. The magistrate judge found that "the ceremonial reference to God in the pledge does not convey endorsement of particular religious beliefs." Supreme Court precedent does not support that conclusion.

In the context of the Pledge, the statement that the United States is a nation "under God" is an endorsement of religion. It is a profession of a religious belief, namely, a belief in monotheism. The recitation that ours is a nation "under God" is not a mere acknowledgment that many Americans believe in a deity. Nor is it merely descriptive of the undeniable historical significance of religion in the founding of the Republic. Rather, the phrase "one nation under God" in the

context of the Pledge is normative. To recite the Pledge is not to describe the United States; instead, it is to swear allegiance to the values for which the flag stands: unity, indivisibility, liberty, justice, and—since 1954—monotheism. The text of the official Pledge, codified in federal law, impermissibly takes a position with respect to the purely religious question of the existence and identity of God. A profession that we are a nation "under God" is identical, for Establishment Clause purposes, to a profession that we are a nation "under Jesus," a nation "under Vishnu," a nation "under Zeus," or a nation "under no god," because none of these professions can be neutral with respect to religion. "[T]he government must pursue a course of complete neutrality toward religion." *Wallace*, 472 U.S. at 60, 105 S. Ct. 2479. Furthermore, the school district's practice of teacher-led recitation of the Pledge aims to inculcate in students a respect for the ideals set forth in the Pledge, and thus amounts to state endorsement of these ideals. Although students cannot be forced to participate in recitation of the Pledge, the school district is nonetheless conveying a message of state endorsement of a religious belief when it requires public school teachers to recite, and lead the recitation of, the current form of the Pledge.

The Supreme Court recognized the normative and ideological nature of the Pledge in *Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L.Ed. 1628. There, the Court held unconstitutional a school district's wartime policy of punishing students who refused to recite the Pledge and salute the flag. *Id.* at 642, 63 S. Ct. 1178. The Court noted that the school district was compelling the students "to declare a belief," *id.* at 631, 63 S. Ct. 1178, and "requir[ing] the individual to communicate by word

and sign his acceptance of the political ideas [the flag] . . . bespeaks," *id.* at 633, 63 S. Ct. 1178. "[T]he compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind." *Id.* The Court emphasized that the political concepts articulated in the Pledge[6] were idealistic, not descriptive: "'[L]iberty and justice for all,' if it must be accepted as descriptive of the present order rather than an ideal, might to some seem an overstatement." *Id.* at 634 n. 14, 63 S. Ct. 1178. The Court concluded that: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642, 63 S. Ct. 1178.

The Pledge, as currently codified, is an impermissible government endorsement of religion because it sends a message to unbelievers "that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch*, 465 U.S. at 688, 104 S. Ct. 1355 (O'Connor, J., concurring). Justice Kennedy, in his dissent in *Allegheny*, agreed:

> [B]y statute, the Pledge of Allegiance to the Flag describes the United States as 'one nation under God.' To be sure, no one is obligated to recite this phrase, . . . but it borders on sophistry to suggest that the reasonable atheist would not feel less than a full member of the political community every time

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[6] *Barnette* was decided before "under God" was added, and thus the Court's discussion was limited to the political ideals contained in the Pledge.

> his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false.

Allegheny, 492 U.S. at 672, 109 S. Ct. 3086 (Kennedy, J., dissenting) (citations and internal quotation marks omitted).[7] Consequently, the policy and the Act fail the endorsement test.

Similarly, the policy and the Act fail the coercion test. Just as in *Lee*, the policy and the Act place students in the untenable position of choosing between participating in an exercise with religious content or protesting. As the Court observed with respect to the graduation prayer in that case: "What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy." *Lee*, 505 U.S. at 592, 112 S. Ct. 2649. Although the defendants argue that the religious content of "one nation under God" is minimal, to an atheist or a believer in certain non-Judeo-Christian religions or philosophies, it may reasonably appear to be an attempt to enforce a "religious orthodoxy" of monotheism, and is therefore impermissible. The coercive effect of this policy is particularly pronounced in the school setting given the age and impressionability of schoolchildren, and their understanding that they are required to adhere to the norms set by their school, their teacher and their fellow students.[8] Furthermore, under *Lee*, the fact that

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[7] For Justice Kennedy, this result was a reason to reject the endorsement test.

[8] The "subtle and indirect" social pressure which permeates the classroom also renders more acute the message sent to non-

students are not required to participate is no basis for distinguishing *Barnette* from the case at bar because, even without a recitation requirement for each child, the mere fact that a pupil is required to listen every day to the statement "one nation under God" has a coercive effect.[9] The coercive effect of the Act is apparent from its context and legislative history, which indicate that the Act was designed to result in the daily recitation of the words "under God" in school classrooms. President Eisenhower, during the Act's signing ceremony, stated: "From this day forward, the millions of our school children will daily proclaim in every city and town, every village and rural schoolhouse, the dedication of our Nation and our people to the Almighty." 100 Cong. Rec. 8618 (1954) (statement of Sen. Ferguson incorporating signing statement of President Eisenhower). Therefore, the policy and the Act fail the coercion test.[10]

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believing schoolchildren that they are outsiders. *See Lee*, 505 U.S. at 592-93, 112 S. Ct. 2649 (stating that "the risk of indirect coercion" from prayer exercises is particularly "pronounced" in elementary and secondary public school because students are subjected to peer pressure and public pressure which is "as real as any overt compulsion").

[9] The objection to the Pledge in *Barnette*, like in the case at bar, was based upon a religious ground. The Pledge in the classroom context imposes upon schoolchildren the constitutionally unacceptable choice between participating and protesting. Recognizing the severity of the effect of this form of coercion on children, the Supreme Court in *Lee* stated, "the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position." 505 U.S. at 593, 112 S. Ct. 2649.

[10] In *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970), this court, without reaching the question of standing, upheld the inscription of the phrase "In God We Trust" on our coins and currency. *But cf. Wooley v. Maynard*, 430 U.S. 705, 722, 97 S. Ct.

Finally we turn to the *Lemon* test, the first prong of which asks if the challenged policy has a secular purpose. Historically, the primary purpose of the 1954 Act was to advance religion, in conflict with the first prong of the *Lemon* test. The federal defendants "do not dispute that the words 'under God' were intended" "to recognize a Supreme Being," at a time when the government was publicly inveighing against atheistic communism. Nonetheless, the federal defendants argue that the Pledge must be considered as a whole when assessing whether it has a secular purpose. They claim that the Pledge has the secular purpose of "solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." *Lynch*, 465 U.S. at 693, 104 S. Ct. 1355.

The flaw in defendants' argument is that it looks at the text of the Pledge "as a whole," and glosses over the 1954 Act. The problem with this approach is apparent when one considers the Court's analysis in *Wallace*. There, the Court struck down Alabama's statute mandating a moment of silence for "meditation or voluntary prayer" not because the final version "as a whole" lacked a primary secular purpose, but because the state legislature had amended the statute specifically and solely to add the words "or voluntary prayer." 472 U.S. at 59-60, 105 S. Ct. 2479.

1428, 51 L.Ed.2d 752 (1977) (Rehnquist, J., dissenting) (stating that the majority's holding leads logically to the conclusion that "In God We Trust" is an unconstitutional affirmation of belief). In any event, *Aronow* is distinguishable in many ways from the present case. The most important distinction is that school children are not coerced into reciting or otherwise actively led to participating in an endorsement of the markings on the money in circulation.

By analogy to *Wallace*, we apply the purpose prong of the *Lemon* test to the amendment that added the words "under God" to the Pledge, not to the Pledge in its final version. As was the case with the amendment to the Alabama statute in *Wallace*, the legislative history of the 1954 Act reveals that the Act's *sole* purpose was to advance religion, in order to differentiate the United States from nations under communist rule." [T]he First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion." *Id.* at 56, 105 S. Ct. 2479 (citations omitted) (applying the *Lemon* test). As the legislative history of the 1954 Act sets forth:

> At this moment of our history the principles underlying our American Government and the American way of life are under attack by a system whose philosophy is at direct odds with our own. Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp. The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator. At the same time it would serve to deny the atheistic and materialistic concepts of communism with its attendant subservience of the individual.

H.R. Rep. No. 83-1693, at 1-2 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2339, 2340. This language reveals that the purpose of the 1954 Act was to take a position on the question of theism, namely, to support the existence and moral authority of God, while "deny[ing] . . .

atheistic and materialistic concepts." *Id.* Such a purpose runs counter to the Establishment Clause, which prohibits the government's endorsement or advancement not only of one particular religion at the expense of other religions, but also of religion at the expense of atheism.

> [T]he Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of a free and voluntary choice by the faithful, and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects—or even intolerance among "religions"—to encompass intolerance of the disbeliever and the uncertain.

Wallace, 472 U.S. at 52-54, 105 S. Ct. 2479.

In language that attempts to prevent future constitutional challenges, the sponsors of the 1954 Act expressly disclaimed a religious purpose. "This is not an act establishing a religion. . . . A distinction must be made between the existence of a religion as an institution and a belief in the sovereignty of God. The phrase 'under God' recognizes only the guidance of God in our national affairs." H.R. Rep. No. 83-1693, at 3 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2339, 2341-42. This alleged distinction is irrelevant for constitutional purposes. The Act's affirmation of "a belief in the sovereignty of God" and its recognition of "the guidance of God" are endorsements by the government of reli-

gious beliefs. The Establishment Clause is not limited to "religion as an institution"; this is clear from cases such as *Santa Fe*, where the Court struck down student-initiated and student-led prayer at high school football games. 530 U.S. at 310-16, 120 S. Ct. 2266. The Establishment Clause guards not only against the establishment of "religion as an institution," but also against the endorsement of religious ideology by the government. Because the Act fails the purpose prong of *Lemon*, we need not examine the other prongs. *Lemon*, 403 U.S. at 612-14, 91 S. Ct. 2105.

Similarly, the school district policy also fails the *Lemon* test. Although it survives the first prong of *Lemon* because, as even Newdow concedes, the school district had the secular purpose of fostering patriotism in enacting the policy, the policy fails the second prong. As explained by this court in *Kreisner v. City of San Diego*, 1 F.3d 775, 782 (9th Cir. 1993), and by the Supreme Court in *School District of Grand Rapids v. Ball*, 473 U.S. 373, 390, 105 S. Ct. 3216, 87 L.Ed.2d 267 (1985), the second *Lemon* prong asks "whether the challenged government action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices."[11] *Ball*, 473

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[11] Although *Ball* was overruled in part by *Agostini* v. *Felton*, 521 U.S. 203, 236, 117 S. Ct. 1997, 138 L.Ed.2d 391 (1997), as the Court stated in *Agostini*, *Ball*'s statement of the general principles and relevant tests to be used in determining what constitutes an Establishment Clause violation remain intact; only the underlying factual assumptions and presumptions have changed. In particular, the Court rejected the following three core assumptions of *Ball*:

U.S. at 390, 105 S. Ct. 3216. Given the age and impressionability of schoolchildren, as discussed above, particularly within the confined environment of the classroom, the policy is highly likely to convey an impermissible message of endorsement to some and disapproval to others of their beliefs regarding the existence of a monotheistic God. Therefore the policy fails the effects prong of *Lemon*, and fails the *Lemon* test. In sum, both the policy and the Act fail the *Lemon* test as well as the endorsement and coercion tests.[12]

> (i) any public employee who works on the premises of a religious school is presumed to inculcate religion in her work; (ii) the presence of public employees on private school premises creates a symbolic union between church and state; and (iii) any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decisionmaking.

Agostini, 521 U.S. at 222, 117 S. Ct. 1997. Therefore, *Ball*'s restatement of the second prong of *Lemon* remains valid even after *Agostini*.

[12] We recognize that the Supreme Court has occasionally commented in dicta that the presence of "one nation under God" in the Pledge of Allegiance is constitutional. *See Allegheny*, 492 U.S. at 602-03, 109 S. Ct. 3086; *Lynch*, 465 U.S. at 676, 104 S. Ct. 1355; *id.* at 693, 104 S. Ct. 1355 (O'Connor, J., concurring); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 303-04, 83 S. Ct. 1560, 10 L.Ed.2d 844 (1963) (Brennan, J., concurring); *id.* at 306-08, 83 S. Ct. 1560 (Goldberg, J., joined by Harlan, J., concurring); *Engel*, 370 U.S. at 435 n. 21, 82 S. Ct. 1261. However, the Court has never been presented with the question directly, and has always clearly refrained from deciding it. Accordingly, it has never applied any of the three tests to the Act or to any school policy regarding the recitation of the Pledge. That task falls to us, although the final word, as always, remains with the Supreme Court.

The only other United States Court of Appeals to consider the issue is the Seventh Circuit, which held in *Sherman v. Community Consolidated School District 21*, 980 F.2d 437 (7th Cir. 1992), that a policy similar to the one before us regarding the recitation of the Pledge of Allegiance containing the words "one nation under God" was constitutional. The *Sherman* court first stated that:

> If as *Barnette* holds no state may require anyone to recite the Pledge, and if as the prayer cases hold the recitation by a teacher or rabbi of unwelcome words is coercion, then the Pledge of Allegiance becomes unconstitutional under all circumstances, just as no school may read from a holy scripture at the start of class.

980 F.2d at 444. It then concludes, however, that this reasoning is flawed because the First Amendment "[does] not establish general rules about speech or schools; [it] call[s] for religion to be treated differently." *Id.* We have some difficulty understanding this statement; we do not believe that the Constitution prohibits compulsory patriotism as in *Barnette*, but permits compulsory religion as in this case. If government-endorsed religion is to be treated differently from government-endorsed patriotism, the treatment must be less favorable, not more.

The Seventh Circuit makes an even more serious error, however. It not only refuses to apply the *Lemon* test because of the Supreme Court's criticism of that test in *Lee*, but it also fails to apply the coercion test from *Lee* or the endorsement test from *Lynch*. Circuit courts are not free to ignore Supreme Court precedent in this manner. *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L.Ed.2d 526 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). Instead of applying any of the tests announced by the Supreme Court, the Seventh Circuit simply frames the question as follows: "Must ceremonial references in civic life to a deity be understood as prayer, or support for all monotheistic religions, to the exclusion of atheists and those who worship multiple gods?" 980 F.2d at 445. Relying in part on Supreme Court dicta regarding the Pledge, the court answers this question in the negative, determining that "under God" is a statement

In conclusion, we hold that (1) the 1954 Act adding the words "under God" to the Pledge, and (2) EGUSD's policy and practice of teacher-led recitation of the Pledge, with the added words included, violate the Establishment Clause. The judgment of dismissal is vacated with respect to these two claims, and the cause is remanded for further proceedings consistent with our holding. Plaintiff is to recover costs on this appeal.

REVERSED AND REMANDED.

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which, taken within its context in the Pledge, is devoid of any significant religious content, and therefore constitutional. *Id.* at 447-48. At the very least, as discussed above in the text, the Supreme Court requires that any policy alleged to be an Establishment Clause violation must be held to the scrutiny of the established tests. Our application of *all* of the tests compels the conclusion that the policy and the Act challenged here violate the Establishment Clause of the Constitution. Thus, we must respectfully differ from the Seventh Circuit.

FERNANDEZ, Circuit Judge, concurring and dissenting:

I concur in parts A, B and C[1] of the majority opinion, but dissent as to part D.

We are asked to hold that inclusion of the phrase "under God" in this nation's Pledge of Allegiance violates the religion clauses of the Constitution of the United States. We should do no such thing. We should, instead, recognize that those clauses were not designed to drive religious expression out of public thought; they were written to avoid discrimination.

We can run through the litany of tests and concepts which have floated to the surface from time to time. Were we to do so, the one that appeals most to me, the one I think to be correct, is the concept that what the religion clauses of the First Amendment require is neutrality; that those clauses are, in effect, an early kind of equal protection provision and assure that government will neither discriminate for nor discriminate against a religion or religions. *See Gentala v. City of Tucson*, 244 F.3d 1065, 1083-86 (9th Cir.) (en banc) (Fernandez, J., dissenting), *cert. granted and judgment vacated by* 534 U.S. 946, 122 S. Ct. 340, 151 L.Ed.2d 256 (2001); *Goehring v. Brophy*, 94 F.3d 1294,

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[1] I admit, however, to serious misgivings about standing to attack 4 U.S.C. § 4 itself. Congress has not compelled anyone to do anything. It surely has not directed that the Pledge be recited in class; only the California authorities have done that. Even if a general lack of standing to directly attack 4 U.S.C. § 4 would deprive federal courts of the opportunity to strike "under God" from that statute, any lament would be no more than a complaint about the limits on federal judges' constitutional power. Nonetheless, that ultimately makes little difference to the resolution of the First Amendment issue in this case.

1306-07 (9th Cir. 1996) (Fernandez, J., concurring). But, legal world abstractions and ruminations aside, when all is said and done, the danger that "under God" in our Pledge of Allegiance will tend to bring about a theocracy or suppress somebody's beliefs is so minuscule as to be de minimis. The danger that phrase presents to our First Amendment freedoms is picayune at most.

Judges, including Supreme Court Justices, have recognized the lack of danger in that and similar expressions for decades, if not for centuries, as have presidents[2] and members of our Congress. *See*, *e.g.*, *County of Allegheny v. ACLU*, 492 U.S. 573, 602-03, 672-73, 109 S. Ct. 3086, 3106, 3143, 106 L.Ed.2d 472 (1989); *Wallace v. Jaffree*, 472 U.S. 38, 78 n. 5, 105 S. Ct. 2479, 86 L.Ed.2d 29 (1985); *Lynch v. Donnelly*, 465 U.S. 668, 676, 693, 716, 104 S. Ct. 1355, 1361, 79 L.Ed.2d 604 (1984); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 306-08, 83 S. Ct. 1560, 1615-16, 10 L.Ed.2d 844 (1963);[3] *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 622 (9th Cir. 1996) (O'Scannlain, J., concurring); *Gaylor v. United States*, 74 F.3d 214, 217-18 (10th Cir. 1996); *Sherman v. Cmty Consol. Sch. Dist. 21*, 980 F.2d 437, 445-48 (7th Cir. 1992); *O'Hair v.*

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[2] *See*, *e.g.*, *Lee v. Weisman*, 505 U.S. 577, 632-35, 112 S. Ct. 2649, 120 L.Ed.2d 467 (1992) (Scalia, J., dissenting).

[3] The citations to the four preceding Supreme Court opinions are to majority opinions, concurring opinions, and dissents. Because my point is that a number of Justices have recognized the lack of danger and because I hope to avoid untoward complication in the setting out of the citations, I have not designated which Justices have joined in which opinion. All in all, however, perusing those opinions indicates that Chief Justice Burger, Chief Justice Rehnquist, and Justices Harlan, Brennan, White, Goldberg, Marshall, Blackmun, Powell, Stevens, O'Connor, Scalia, and Kennedy have so recognized.

Murray, 588 F.2d 1144, 1144 (5th Cir. 1979) (per curiam); *Aronow v. United States*, 432 F.2d 242, 243-44 (9th Cir. 1970); *cf. Marsh v. Chambers*, 463 U.S. 783, 795, 103 S. Ct. 3330, 77 L.Ed.2d 1019 (1983) (legislative prayer). I think it is worth stating a little more about two of the cases which I have just cited. In *County of Allegheny*, 492 U.S. at 602-03, 109 S. Ct. at 3106, the Supreme Court had this to say: "Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief." The Seventh Circuit, reacting in part to that statement, has wisely expressed the following thought:

> Plaintiffs observe that the Court sometimes changes its tune when it confronts a subject directly. True enough, but an inferior court had best respect what the majority says rather than read between the lines. If the Court proclaims that a practice is consistent with the establishment clause, we take its assurances seriously. If the Justices are just pulling our leg, let them say so.

Sherman, 980 F.2d at 448.

Some, who rather choke on the notion of de minimis, have resorted to the euphemism "ceremonial deism." *See*, *e.g.*, *Lynch*, 465 U.S. at 716, 104 S. Ct. at 1382 (Brennan, J., dissenting). But whatever it is called (I care not), it comes to this: such phrases as "In God We Trust," or "under God" have no tendency to establish a religion in this country or to suppress anyone's exercise, or non-exercise, of religion, except in the fevered eye of persons who most fervently would like to drive all tincture of religion out of the public life of our polity.

Those expressions have not caused any real harm of that sort over the years since 1791, and are not likely to do so in the future.[4] As I see it, that is not because they are drained of meaning.[5] Rather, as I have already indicated, it is because their tendency to establish religion (or affect its exercise) is exiguous. I recognize that some people may not feel good about hearing the phrases recited in their presence, but, then, others might not feel good if they are omitted. At any rate, the Constitution is a practical and balanced charter for the just governance of a free people in a vast territory. Thus, although we do feel good when we contemplate the effects of its inspiring phrasing and majestic promises, it is not primarily a feel-good prescription.[6] In *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 630, 642, 63 S. Ct. 1178, 1181, 1187, 87 L.Ed. 1628 (1943), for example, the Supreme Court did not say that the Pledge could not be recited in the presence of Jehovah's Witness children; it merely said that they did not have to recite it.[7] That fully protected their con-

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[4] They have not led us down the long path to kulturkampf or worse. Those who are somehow beset by residual doubts and fears should find comfort in the reflection that no baleful religious effects have been generated by the existence of similar references to a deity throughout our history. More specifically, it is difficult to detect any signs of incipient theocracy springing up since the Pledge was amended in 1954.

[5] *See also Sherman*, 980 F.2d at 448 (Manion, J., concurring).

[6] We, by the way, indicated as much in *American Family Ass'n, Inc. v. City and County of San Francisco*, 277 F.3d 1114, 1125-26 (9th Cir. 2002), which involved governmental conduct that was much more questionable than adoption of the phrase "under God." *See id.* at 1126-28 (Noonan, J., dissenting).

[7] I recognize that the Pledge did not then contain the phrase "under God."

stitutional rights by precluding the government from trenching upon "the sphere of intellect and spirit." *Id.* at 642, 63 S. Ct. at 1187. As the Court pointed out, their religiously based refusal "to participate in the ceremony [would] not interfere with or deny rights of others to do so." *Id.* at 630, 63 S. Ct. at 1181. We should not permit Newdow's feel-good concept to change that balance.

My reading of the stelliscript suggests that upon Newdow's theory of our Constitution, accepted by my colleagues today, we will soon find ourselves prohibited from using our album of patriotic songs in many public settings. "God Bless America" and "America the Beautiful" will be gone for sure, and while use of the first three stanzas of "The Star Spangled Banner" will still be permissible, we will be precluded from straying into the fourth.[8] And currency beware! Judges can accept those results if they limit themselves to elements and tests, while failing to look at the good sense and principles that animated those tests in the first place. But they do so at the price of removing a vestige of the awe we all must feel at the immenseness of the universe and our own small place within it, as well as the wonder we must feel at the good fortune of our country. That will cool the febrile nerves of a few at the cost of removing the healthy glow conferred upon many citizens when the forbidden verses, or phrases, are uttered, read, or seen.

In short, I cannot accept the eliding of the simple phrase "under God" from our Pledge of Allegiance, when it is obvious that its tendency to establish religion

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[8] Nor will we be able to stray into the fourth stanza of "My Country 'Tis of Thee" for that matter.

in this country or to interfere with the free exercise (or non-exercise) of religion is de minimis.[9]

Thus, I respectfully concur in part and dissent in part.

[9] Lest I be misunderstood, I must emphasize that to decide this case it is not necessary to say, and I do not say, that there is such a thing as a de minimis constitutional violation. What I do say is that the de minimis tendency of the Pledge to establish a religion or to interfere with its free exercise is no constitutional violation at all.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-16423
D.C. No. CV 00-00495-MLS/PAN

MICHAEL A. NEWDOW, PLAINTIFF-APPELLANT

v.

U.S. CONGRESS; UNITED STATES OF AMERICA; GEORGE W. BUSH,* PRESIDENT OF THE UNITED STATES; STATE OF CALIFORNIA; ELK GROVE UNIFIED SCHOOL DISTRICT; DAVID W. GORDON, SUPERINTENDENT EGUSD; SACRAMENTO CITY UNIFIED SCHOOL DISTRICT; JIM SWEENEY, SUPERINTENDENT SCUSD, DEFENDANTS-APPELLEES

Appeal from the United States District Court for the Eastern District of California, Milton L. Schwartz, Senior Judge, Presiding

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Argued and Submitted: March 14, 2002
Filed: June 26, 2002
Amended: February 28, 2003

ORDER

The opinion filed June 26, 2002, is ordered amended. The Clerk is instructed to file the amended opinion with

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* George W. Bush is substituted for his predecessor, William Jefferson Clinton, as President of the United States. Fed. R. App. P. 43(c)(2).

Judge Fernandez's amended concurrence/dissent. Judge Reinhardt's concurrence in the order denying rehearing en banc, along with Judge O'Scannlain's and Judge McKeown's dissent from that order shall also be filed.

The Clerk is also instructed not to accept for filing any new petitions for rehearing and petitions for rehearing en banc in this case.

With the opinion thus amended, the panel has voted unanimously to deny the petitions for rehearing.

The full court has been advised of the petitions for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the non-recused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petitions for rehearing are DENIED and the petitions for rehearing en banc are DENIED.

REINHARDT, Circuit Judge, concurring in the order:

My views as to the merits of this issue are set forth in the amended majority opinion authored by Judge Goodwin, and I adhere to them fully. I write separately for two reasons unrelated to the contents of that opinion. I write first to comment on the separate dissent to the denial of rehearing en banc authored by Judge McKeown and joined in by Judges Hawkins, Thomas, and Rawlinson, in which my colleagues appear to express the view that a case should be reheard en banc whenever it involves "a question of exceptional importance." FED. R. APP. P. 35(a)(2).[1] Second, I am

[1] While the brief separate dissent is deliberately opaque and uninformative, I would suspect that not all of its signatories

compelled to register my strong disagreement with one particularly unfortunate aspect of Judge O'Scannlain's principal dissent that reflects a serious misconception of fundamental constitutional principles and the proper role of the federal judiciary.

I

As to the first question, I disagree with the notion that the importance of an issue is a sufficient reason to take a case en banc, either under the Rule or as a matter of judicial policy. Rule 35(a) advises this court of its *discretionary* power to order that a case already decided by a three-judge panel be reheard by the full court. Specifically, the rule begins by stating that a "majority of the circuit judges who are in regular active service *may* order that an appeal or other proceeding be heard or reheard by the court of appeals en banc." FED. R. APP. P. 35(a) (emphasis added). Subsection two guides such discretionary consideration by stating that one compelling reason to grant rehearing en banc is the "exceptional importance" of a particular case.

The most reasonable construction of the Rule is that this court should rehear a case en banc when it is *both* of exceptional importance *and* the decision *requires correctio*n. *See United States* v. *Burdeau*, 180 F.3d 1091, 1092 (9th Cir. 1999) (Tashima, J., concurring in the order denying rehearing en banc) ("Subject to rare exceptions. . . . we should review the statements in three[-]judge panel opinions only to 'determine whether the [panel's] legal error resulted in an erroneous

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believe that the general rule they appear to advocate should apply regardless of the "correctness" of the panel opinion. The concept that "exceptional importance" is, without more, a sufficient reason for en banc review is, however, shared by at least several members of the Court and accordingly merits some discussion.

judgment . . . . .'") (quoting *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council*, 467 U.S. 837, 842 (1984)). A decision may warrant correction because a three-judge panel has reached a result or adopted a legal rule or principle that conflicts with our existing circuit law or that the majority of our court believes is incorrect and needs further review. The fact that three-judge panels often decide cases of exceptional importance, whether it be the constitutionality of a state's decision to execute an individual who may be innocent, the existence or non-existence of a fundamental right, or the ability of the Congress to require the states to comply with federal law—an issue that some of us thought had been settled by the successful end to the Civil War—is an unremarkable, but undeniably important, aspect of our appellate system. *See* Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213, 218 (1999) (stating that three-judge panels "representing and acting on behalf of the whole court" is a "basic tenet of our intermediate appellate system"). Unless reconsidered en banc, a decision of a three-judge panel *is* a decision of our court and speaks for our court. Moreover, it ordinarily constitutes the final judicial decision.[2]

To rehear a case en banc *simply* on the basis that it involves an important issue would undermine the three-

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[2] While the Supreme Court unquestionably has the authority to review any or all of the decisions of the Court of Appeals, the Court has elected to hear a remarkably small number of cases in recent years. For example, in the 2001 term, of the 7,852 case filings, the Court heard argument in 88 cases, and disposed of 85 in 76 signed opinions. *See* Supreme Court of the United States, *2002 Year-End Report on the Federal Judiciary*, *at* http://www.supremecourtus.gov/publicinfo/year-end/2002year-endreport.html.

judge panel system and create an impractical and crushing burden on what otherwise should be, as Rule 35(a) suggests, an exceptional occurrence. *See* FED. R. APP. P. 35(a) ("An en banc hearing or rehearing is not favored . . . ."). According to statistics kept by the Clerk of the court, in 2002 this court decided 5,190 cases on the merits, more than 98% of which were finally decided by three-judge panels. These decisions are not measures of "rough justice," later to be refined by the en banc court. Unless they decide issues of exceptional importance erroneously, create a direct intra-circuit split, or unless the interests of justice require that the decision be corrected, the opinions of three-judge panels should constitute the final action of this court.

II

I also feel compelled to discuss a disturbingly wrong-headed approach to constitutional law manifested in the dissent authored by Judge O'Scannlain. The dissent suggests that this court should be able to conclude that the panel's holding was erroneous by observing the "public and political reaction" to its decision. Dissent at 2783. This is not the first time that the magnitude of the political response regarding an issue has distracted certain members of this court. An equally disturbing misunderstanding of the nature of our Constitution and the role of the federal judiciary was manifested in *Coalition for Econ. Equity* v. *Wilson*, 122 F.3d 692 (9th Cir. 1997), a case involving a California initiative on the subject of affirmative action. There, the three-judge panel, in a case that unfortunately was not taken en banc, notwithstanding its exceptional importance, made the following remarkable statement: "A system which permits one judge to block with the stroke of a pen what 4,736,180 state residents voted to enact as law

tests the integrity of our constitutional democracy." *Id.* at 699 (O'Scannlain, J.).

The Bill of Rights is, of course, intended to protect the rights of those in the minority against the temporary passions of a majority which might wish to limit their freedoms or liberties. As Justice Jackson recognized:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

W. Va. State Bd. of Educ. v. *Barnette*, 319 U.S. 624, 638 (1943). It is the highest calling of federal judges to invoke the Constitution to repudiate unlawful majoritarian actions and, when necessary, to strike down statutes that would infringe on fundamental rights, whether such statutes are adopted by legislatures or by popular vote. The constitutional system that vests such power in an independent judiciary does not "test[ ] the integrity of . . . democracy." It makes democracy vital, and is one of our proudest heritages.

Moreover, Article III judges are by constitutional design insulated from the political pressures governing members of the other two branches of government. We are given life tenure and a secured salary so that, in our unique capacity to "say what the law is," *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), we may decide constitutional issues without regard to popular

vote, political consequence, or the prospect of future career advancement.[3] Most federal judges do not question the wisdom of this approach. When the federal judiciary is so firmly separated by constitutional structure from the direct influence of politics, we must not undermine that structure by allowing political pressures, polls, or "focus groups" to influence our opinions, even indirectly.

This is not to say that federal judges should be completely sequestered from the attitudes of the nation we serve, even though our service is accomplished not through channeling popular sentiment but through strict adherence to established constitutional principles. The Constitution contemplates occasions when we must be responsive to *long-term* societal trends—when determining, for example, that which is "cruel and unusual," *see Hudson* v. *McMillian*, 503 U.S. 1, 9 (1992), whether in the execution of the mentally retarded, *see Atkins* v. *Virginia*, 536 U.S. 304, ___, 122 S. Ct. 2242, 2247 (2002), or the execution of juvenile offenders, *see In re Stanford*, 123 S.Ct. 472, 474 (2002) (Stevens, J., dissenting from the denial of an application for an original writ of habeas corpus). This broader long-term

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[3] Alexander Hamilton was admirably cognizant of the danger of relying on temporary political whimsy:

> This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjectures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

THE FEDERALIST NO. 78, at 437 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

social conscience, however, is a matter far different from responding to particular immediate political pressures. We may not—we must not—allow public sentiment or outcry to guide our decisions. It is particularly important that we understand the nature of our obligations and the strength of our constitutional principles in times of national crisis; it is then that our freedoms and our liberties are in the greatest peril. Any suggestion, whenever or wherever made, that federal judges should be encouraged by the approval of the majority or deterred by popular disfavor is fundamentally inconsistent with the Constitution and must be firmly rejected.

O'SCANNLAIN, Circuit Judge, with whom KLEINFELD, GOULD, TALLMAN, RAWLINSON, and CLIFTON, Circuit Judges, join, dissenting from the denial of rehearing en banc:

Last June, a two-judge majority of a three-judge panel of this court ruled that the Pledge of Allegiance was unconstitutional simply because of the presence of two offending words: "under God." It was an exercise in judicial legerdemain which, not surprisingly, produced a public outcry across the nation. Since that time we, as a court, have had the opportunity to order reconsideration of that decision en banc, yet a majority of the 24 active judges eligible to vote has decided not to do so. While there are, no doubt, varied and plausible reasons why this result occurred, I respectfully conclude that our court has made a serious mistake and thus must dissent from its order denying reconsideration.

I

While I cannot say that a randomly selected 11-judge panel would have ruled differently, I believe that neither the June 2002 version, *Newdow* v. *United States Congres*s, 292 F.3d 597 (9th Cir. 2002) ("*Newdow* I"), nor today's slightly revised version, ___ F.3d ___ ("*Newdow II*") to essentially the same effect, is defensible. We should have reheard *Newdow I* en banc, not because it was controversial, but because it was wrong, very wrong—wrong because reciting the Pledge of Allegiance is simply not "a religious act" as the two-judge majority asserts, wrong as a matter of Supreme Court precedent properly understood, wrong because it set up a direct conflict with the law of another circuit,

and wrong as a matter of common sense.[1] We should have given 11 judges a chance to determine whether the two-judge majority opinion truly reflects the law of the Ninth Circuit.[2] Reciting the Pledge of Allegiance cannot possibly be an "establishment of religion" under *any* reasonable interpretation of the Constitution.[3]

Perhaps in an effort to avoid ultimate Supreme Court review, *Newdow II* which replaces it, avoids expressly reaching the technical question of the constitutionality of the 1954 Act. Fundamentally, however, the amended decision is every bit as bold as its predecessor. It bans

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[1] Judge Reinhardt's protestations to the contrary notwithstanding, I, too, believe that "[o]ur judicial charge is to stand above the inflamed passions of the public." *Dazo* v. *Globe Airport Sec. Serv.*, 295 F.3d 934, 943 (9th Cir. 2002) (O'Scannlain, J., concurring and dissenting). My disagreement with the panel majority has nothing to do with bending to the will of an outraged populace, and everything to do with the fact that Judge Goodwin and Judge Reinhardt misinterpret the Constitution and 40 years of Supreme Court precedent. That most people understand this makes the decision no less wrong. It doesn't take an Article III judge to recognize that the voluntary recitation of the Pledge of Allegiance in public school does not violate the First Amendment.

[2] This case presents the classic situation required for our court to rehear a case en banc. En banc consideration would have allowed us to correct the error of a prior panel's decision with respect to the Pledge *and* resolve a constitutional question of exceptional importance that affects the lives of millions of school children who reside within the geographical boundaries of the Ninth Circuit. *See* Fed. R. App. P. 35(a). The exceptional importance of this case reinforces the need for correction of the panel's mistaken view of our Constitution.

[3] U.S. Const. Amend. I. ("Congress shall make no law respecting an *establishment of religion*, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.") (emphasis added).

the voluntary recitation of the Pledge of Allegiance in the public schools of the nine western states thereby directly affecting over 9.6 million students,[4] necessarily *implies* that both an Act of Congress[5] and a California law[6] are unconstitutional, clearly conflicts with the Seventh Circuit's decision in *Sherman* v. *Cmty. Consol. Sch. Dist. 21 of Wheeling Township*, 980 F.2d 437 (1992), and threatens cash-strapped school districts and underpaid teachers with the specter of civil actions for money damages pursuant to 42 U.S.C. § 1983.

Newdow I, the subject of our en banc vote, no longer exists; it was withdrawn after the en banc call failed. The panel majority has evolved to this extent: in *Newdow I* the Pledge was unconstitutional for everybody; in *Newdow II* the Pledge is only unconstitutional for public school children and teachers. The remainder of this dissent is directed entirely to *Newdow II*, which, as shall be demonstrated, differs little from *Newdow I* in its central holding. With grim insistence, the majority in *Newdow II* continues to stand by its original error—that voluntary recitation of the Pledge of Alle-

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[4] *See* U.S. Dep't of Ed., Nat'l Ctr. for Ed. Statistics, available at http://nces.ed.gov/pubs2002/snf_report/table_01_1.asp. The approximate figure is for the school year 2000-01, comprising the states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington,

[5] 4 U.S.C. § 4 ("The Pledge of Allegiance to the Flag: 'I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.' ").

[6] Cal. Educ. Code § 52720. This section provides that "at the beginning of the first regularly scheduled class or activity period . . . there shall be conducted appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section."

giance in public school violates the Establishment Clause because, according to the two-judge panel majority, it is "a religious act." *Newdow II*, ___ F.3d at ___. Common sense would seem to dictate otherwise, as the public and political reaction should by now have made clear. If reciting the Pledge is truly "a religious act" in violation of the Establishment Clause, then so is the recitation of the Constitution[7] itself, the Declaration of Independence,[8] the Gettysburg Address,[9] the National Motto,[10] or the singing of the National Anthem.[11] Such an assertion would make hypocrites out of the Founders, and would have the effect of

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[7] U.S. Const. Art. VII. ("Year of *our Lord*") (emphasis added).

[8] The Declaration of Independence contains multiple references to God. The founders claimed the right to "dissolve the political bands" based on "the Laws of Nature and of *Nature's God*." The most famous passage, of course, is that "all men are created equal, that they are endowed by *their Creator* with certain unalienable Rights." Subsequently, the signatories "appeal[ ] to the *Supreme Judge of the world* to rectify their intentions."

[9] On November 19, 1863, President Lincoln declared "that this Nation, *under God*, shall have a new birth of freedom—and that Government of the people, by the people, for the people, shall not perish from the earth."

[10] *See* 36 U.S.C. § 302. (" '*In God* we trust' is the national motto.") (emphasis added).

[11] *See* 36 U.S.C. § 301(a) ("The composition consisting of the words and music known as the Star-Spangled Banner is the national anthem."). In fact, the Anthem is much more explicitly religious in content than the Pledge, and much more than a 'mere' profession of the *composer's* faith in a Supreme Being, as the majority would have it. *See Newdow II*, ___ F.3d at ___. Consider the following passage from the fourth stanza: "Blest with victory and peace, may the *heaven-rescued* land, Praise *the Power* that hath made and preserved us a nation. Then conquer we must, when our cause is just, And this be our motto: '*In God* is our trust.' "(emphasis added).

driving any and all references to our religious heritage out of our schools, and eventually out of our public life.

II

The *Newdow II* majority's primary legal argument is that the Supreme Court's decision in *Lee* v. *Weisman*, 505 U.S. 577 (1992), a school prayer case, controls the outcome of this case. In fact, rather than merely following *Lee* and its predecessors, the two-judge panel majority makes a radical departure from *Lee* and the cases it purports to apply. To understand why this is so, an examination of the Supreme Court's school prayer decisions which culminate in *Lee* is in order.

A

1

The fountainhead of all school prayer cases is *Engel* v. *Vitale*, 370 U.S. 421 (1962). In *Engel* the Court considered a school policy whereby children were directed to say aloud a prayer composed by state officials. The Court found that this practice was inconsistent with the Establishment Clause, reasoning that "[the] program of daily classroom invocation of God's blessings as prescribed in the Regents' prayer is a religious activity. It is a solemn avowal of divine faith and supplication for the blessings of the Almighty. The nature of such a prayer has always been religious." *Id.* at 424-25. The Court concluded by stating that the state should leave prayer, "that purely religious function, to the people themselves." *Id.* at 435. In a footnote, it reasoned as follows:

> There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to

> express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.

Id. at 435 n.21. The Court drew an explicit distinction between patriotic invocations of God on the one hand, and prayer, an "unquestioned religious exercise," on the other. Concurring, Justice Douglas wrote that the narrow question presented was whether the state "oversteps the bounds when it finances a religious exercise." *Id.* at 439 (Douglas, J., concurring). Justice Douglas noted that the Pledge of Allegiance, "like . . . prayer, recognizes the existence of a Supreme Being." *Id.* at 440 n.5. However, he noted that the House Report recommending the addition of the words "under God" to the Pledge stated that those words "in no way run contrary to the First Amendment but recognize 'only the guidance of God in our national affairs.'" *Id.* (quoting H.R. Rep. No. 1693, 83d Cong., 2d Sess., p. 3).

2

The following year, the Supreme Court decided *Abington School Dist.* v. *Schempp*, 374 U.S. 203 (1963). In that case, the Court considered the constitutionality of a Pennsylvania statute requiring that "[a]t least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day." *Id.* at 205. The practice in public schools

was for a teacher or student volunteer to read the required Bible verses each morning. This in turn was followed by a recitation of the Lord's prayer. Finally, the class would recite the Pledge of Allegiance to the Flag. *Id.* at 207-08. The Court struck down the Bible reading and the practice of reciting the Lord's prayer as a state prescribed "religious ceremony," *id.* at 223, but said nothing about the practice of reciting the Pledge.

As in *Engel*, the Court took pains to point to the character of the exercises it found wanting. The Court reasoned that "reading . . . the verses . . . possesses a devotional and religious character and constitutes in effect a religious observance. The devotional and religious nature of the morning exercises is made all the more apparent by the fact that the Bible reading is followed immediately by a recital in unison by the pupils of the Lord's prayer." *Id.* at 210. "The pervading religious character of the ceremony," wrote Justice Clark, "cannot be gainsaid," and led to the conclusion that the exercises violated the Establishment Clause. *Id.* at 224.

The concurring opinions in *Schempp* were all to the same effect. Justice Douglas agreed with the majority's conclusion that the practices at issue violated the Establishment Clause because "the State is conducting a religious exercise." *Id.* at 229 (Douglas, J., concurring). In a lengthy concurrence, Justice Brennan wrote that "[t]he religious nature of the exercises here challenged seems plain." *Id.* at 266 (Brennan, J., concurring). After surveying the history of devotional exercises in American public schools, Justice Brennan stated that "the panorama of history permits no other conclusion than that daily prayers and Bible readings in

the public schools have always been designed to be, and have been regarded as, essentially religious exercises." *Id.* at 277-78. For Justice Brennan, "religious exercises in the public schools present a unique problem" but "not every involvement of religion in public life violates the Establishment Clause." *Id.* at 294. He warned that "[a]ny attempt to impose rigid limits upon the mention of God . . . in the classroom would be fraught with dangers." *Id.* at 301. Specifically, he wrote that "[t]he reference to divinity in the revised pledge of allegiance . . . may merely recognize the historical fact that our Nation was believed to have been founded 'under God.' Thus reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact." *Id.* at 304.

Justice Goldberg also wrote separately, stating that "the clearly religious practices presented in these cases are . . . wholly compelling." *Id.* at 305 (Goldberg, J., concurring). He reasoned that "[t]he pervasive religiosity and direct governmental involvement inhering in the prescription of prayer and Bible reading in the public schools . . . cannot realistically be termed simply accommodation." *Id.* at 307. Like Justice Brennan, Justice Goldberg cautioned that the decision "does not mean that all incidents of government which import of the religious are therefore and without more banned by the strictures of the Establishment Clause." *Id.* at 307-08. He then quoted in full the passage from *Engel* which drew a distinction between patriotic invocations of God, and unquestioned religious exercises that give rise to Establishment Clause violations. *Id.*

3

The next case in this line is *Wallace* v. *Jaffree*, 472 U.S. 38 (1985). That case considered the constitutionality of an Alabama statute authorizing a 1-minute period of silence in public schools "for meditation or voluntary prayer." *Id.* at 40. The Court found that "[t]he wholly religious character" of the challenged law was "plainly evident from its text." *Id.* at 58. The legislature's one and only purpose in enacting the law was "to return prayer to the public schools." *Id.* at 59-60. Justice Powell's separate concurrence was "prompted by Alabama's persistence in attempting to institute state-sponsored prayer in the public schools." *Id.* at 62 (Powell, J., concurring). Justice O'Connor wrote separately to suggest that moment-of-silence statutes were not "a religious exercise," and therefore were constitutional. *Id.* at 72 (O'Connor, J., concurring). Justice O'Connor wrote further that "the words 'under God' in the Pledge . . . serve as an acknowledgment of religion with 'the legitimate secular purposes of solemnizing public occasions, [and] expressing confidence in the future.'" *Id.* at 78 n.5 (quoting *Lynch* v. *Donnelly*, 465 U.S. 668, 693 (O'Connor, J., concurring)) (alterations in original). In contrast, the Alabama statute at issue was very different from the Pledge—the state had "intentionally crossed the line [by] affirmatively endorsing the particular religious practice of prayer." *Id.* at 84.

4

Finally, there is the Supreme Court's decision in *Lee* v. *Weisman*. The issue presented was "whether including clerical members who offer prayers as part of the official school graduation ceremony" is consistent

with the Establishment Clause. 505 U.S. at 580. The graduating students entered as a group in a processional, after which "the students stood for the Pledge of Allegiance and remained standing during the rabbi's prayers." *Id.* at 583. Justice Kennedy wrote that "the significance of the prayers lies . . . at the heart of [the] case." *Id.* He framed the inquiry as follows:

> These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.

Id. at 586.

The Court in *Lee* concluded that *Engel* and its progeny controlled the outcome, writing that "[c]onducting this formal religious observance conflicts with settled rules pertaining to prayer exercises for students." *Id.* at 587. As in *Engel*, *Schempp*, and *Wallace*, the crucial factor was the nature of the exercise in which the students were asked to participate. Time and again the Court went out of its way to stress the nature of the exercise, writing that prayer was "an overt religious exercise," *id.* at 588, and that "prayer exercises in public schools carry a particular risk of indirect coercion." *Id.* at 592. The practice was unconstitutional because "the State has in every practical sense compelled attendance and participation in an explicit re-

ligious exercise at an event of singular importance to every student." *Id.* at 598. Just like the decisions in *Engel* and *Schempp*, the Court in *Lee* took pains to stress the confines of its holding, concluding that "[w]e do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive," *id.* at 597, and that "[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution." *Id.* at 598.

B

Two fundamental principles may therefore be derived from the school prayer cases culminating in *Lee*.

1

Formal religious observances are prohibited in public schools because of the danger that they may effect an establishment of religion. *See Engel*, 370 U.S. at 424-25 ("[D]aily classroom invocation of God's blessings . . . is a religious activity."); *Schempp*, 374 U.S. at 210 (Bible reading followed by the Lord's prayer "possesses a devotional and religious character and constitutes in effect a religious observance."); *Wallace*, 472 U.S. at 58 (Prayer is of a "wholly religious character."); *Lee*, 505 U.S. at 586 (Prayer written by state officials constitutes a "formal religious exercise"). In each of these cases, the Court took pains to stress that not every reference to God in public schools was prohibited. *See Engel*, 370 U.S. at 435 n.21 ("patriotic or ceremonial occasions" which contain "references to the Deity" bear "no true resemblance to the unquestioned religious exercise" of prayer); *Schempp*, 374 U.S. at 301 (Brennan, J., concurring) ("Any attempt to impose rigid limits upon the

mention of God . . . in the classroom would be fraught with dangers."); *Wallace*, 472 U.S. at 78 n.5 (O'Connor, J., concurring) ("the words 'under God' in the Pledge" are not unconstitutional); *Lee*, 505 U.S. at 598 ("A relentless and all-pervasive attempt to exclude religion . . . could itself become inconsistent with the Constitution.").

2

Once it is established that the state is sanctioning a formal religious exercise, then the fact that the students are not *required* to participate in the formal devotional exercises does not prevent those exercises from being unconstitutional. *See Engel*, 370 U.S. at 431 ("[T]he indirect coercive pressure upon religious minorities to conform" to the prayer exercises "is plain."); *Schempp*, 374 U.S. at 210-11 ("The fact that some pupils, or theoretically all pupils, might be excused from attendance at the exercises does not mitigate the obligatory nature of the ceremony."); *Wallace*, 472 U.S. at 57 (State-sanctioned *voluntary* prayer in public schools violates Establishment Clause); *Lee*, 505 U.S. at 592 ("[P]rayer exercises in public schools carry a particular risk of indirect coercion."). To be sure, *Lee* is the Court's most elaborate pronouncement with respect to indirect coercion. It identifies the circumstances in which indirect coercion may be said to be unconstitutional: when the government directs "the performance of a formal religious exercise" in such a way as to oblige the participation of objectors. *Lee*, 505 U.S. at 586.

III

No court, state or federal, has *ever* held, even now, that the Supreme Court's school prayer cases apply

outside a context of state-sanctioned formal religious observances. But *Newdow II* finesses all that, and the sleight of hand the majority uses becomes immediately apparent: obfuscate the nature of the exercise at issue and emphasize indirect coercion. The panel majority simply ignores, because they are inconvenient, the "dominant and controlling facts" in *Lee* and its predecessors: that Establishment Clause violations in public schools are triggered only when "State officials direct the performance of a *formal religious exercise*." 505 U.S. at 586 (emphasis added); *see also Schempp*, 374 U.S. at 210 ("devotional . . . religious observance" prohibited); *Wallace*, 472 U.S. at 58 (activities of a "wholly religious character" prohibited).

A

To avoid a flagrant inconsistency with *Lee*, and with 40 years of Supreme Court precedent, the two-judge panel majority must first examine whether the act of pledging allegiance is "a religious act." As the Seventh Circuit in *Sherman* framed it, "Does 'under God' make the Pledge a prayer, whose recitation violates the establishment clause of the first amendment?" 980 F.2d at 445. That court answered the question in the negative; the *Newdow II* majority, in conclusory fashion, simply *assumes* the affirmative. ___ F.3d at ___ ("[W]e conclude that the school district policy impermissibly coerces *a religious act*.") (emphasis added).

This assertion belies common sense. Most assuredly, to pledge allegiance to flag and country is a *patriotic* act. After the public and political reaction last summer, it is difficult to believe that anyone can continue to think otherwise. The fact the Pledge is infused with an undoubtedly religious reference does not change the

nature of the act itself. The California statute under which the school district promulgated its policy is entitled "[d]aily performance of *patriotic exercises* in public schools." Cal. Educ. Code § 52720 (emphasis added). The Pledge is recited not just in schools but also at various official events and public ceremonies, including perhaps the most patriotic of occasions—naturalization ceremonies. Generally, the Pledge is recited while standing, facing a United States flag, with the right hand held over the heart, much like the National Anthem. *See* 4 U.S.C. § 4 (articulating proper procedure for reciting Pledge); 36 U.S.C. § 301 (during anthem "all present . . . should stand at attention facing the flag with the right hand over the heart."). Whatever one thinks of the normative values underlying the Pledge, they are unquestionably patriotic in nature. Indeed, it is precisely because of the Pledge's explicitly patriotic nature that in 1943 the Supreme Court ruled that no one is *required* to Pledge allegiance against their will. *West Virginia* v. *Barnette*, 319 U.S. 624, 642 (1943).

In contrast, to pray is to speak directly to God, with bowed head, on bended knee, or some other reverent disposition. It is a solemn and humble approach to the divine in order to give thanks, to petition, to praise, to supplicate, or to ask for guidance. Communal prayer, by definition, is an even more forceful and profound experience for those present. Little wonder that the Supreme Court has recognized the "unique problem" and "particular risk" posed by school prayer to non-participating students. *Lee*, 505 U.S. at 592 ("[P]rayer exercises in public schools carry a particular risk of indirect coercion."); *Schempp*, 374 U.S. at 294 (Brennan,

J., concurring) (noting that prayers in public schools "present a unique problem").

Not only does the panel majority's conclusion that pledging allegiance is "a religious act" defy common sense, it contradicts our 200-year history and tradition of patriotic references to God. The Supreme Court has insisted that interpretations of the Establishment Clause must comport "with what history reveals was the contemporaneous understanding of its guarantees." *Lynch*, 465 U.S. at 673; *see also Schempp*, 374 U.S. at 294 ("[T]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers.") (Brennan, J., concurring).

The majority's unpersuasive and problematic disclaimers notwithstanding, *Newdow II* precipitates a "war with our national tradition," *McCollum* v. *Bd. of Ed.*, 333 U.S. 203, 211 (1948), and as Judge Fernandez so eloquently points out in dissent, only the purest exercise in sophistry could save multiple references to our religious heritage in our national life from *Newdow II*'s axe. Of course, the Constitution itself explicitly mentions God, as does the Declaration of Independence, the document which marked us as a separate people. The Gettysburg Address, inconveniently for the majority, contains the *same precise phrase*—"under God"—found to constitute an Establishment Clause violation in the Pledge.[12] After *Newdow II*, are we to suppose that, were a school to permit—not require—the recitation of the Constitution, the Declaration of Independence, or the Gettysburg Address in public schools, that too would violate the Constitution? Were

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[12] *See infra* footnote 9.

the "founders of the United States . . . unable to understand their own handiwork[?]" *Sherman*, 980 F.2d at 445. Indeed, the recitation of the Declaration of Independence would seem to be the better candidate for the chopping block than the Pledge, since the Pledge does not require anyone to acknowledge the *personal* relationship with God to which the Declaration speaks.[13] So too with our National Anthem and our National Motto.

Our national celebration of Thanksgiving dates back to President Washington, which Congress stated was "to be observed by acknowledgment with grateful hearts, the many and signal favours of Almighty God." *Lynch*, 465 U.S. at 675 n.2. Congress made Thanksgiving a permanent holiday in 1941,[14] and Christmas has been a national holiday since 1894.[15] Are pere [*sic*] Newdow's constitutional rights violated when his daughter is told not to attend school on Thanksgiving? On Christmas day? Must school outings to federal courts be prohibited, lest the children be unduly influenced by the dreaded intonation "God save these United States and this honorable Court"?[16] A theory of the Establishment Clause that would have the effect of driving out of our public life the multiple references to

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[13] *See infra* footnote 8.

[14] *See* 5 U.S.C. § 6103(a).

[15] *See id.*

[16] Indeed, even our own court's formal announcement to open sessions contains the offending word: "Hear ye! hear ye! All persons having business with the honorable, the United States Court of Appeals for the Ninth Circuit will now draw near, give your attention and you will be heard, for this court is now in session. *God save* these United States and this honorable Court." (emphasis added).

the Divine that run through our laws, our rituals, and our ceremonies is no theory at all.

B

As if all of this were not enough, the Supreme Court has gone out of its way to make it plain that the Pledge itself passes constitutional muster. In two of the school prayer cases, the Court noted without so much as a hint of disapproval the fact that the students, in addition to being subject to formal religious observances, *also* recited the Pledge of Allegiance. *See Schempp*, 374 U.S. at 207-08 (noting that the practice in public schools consisted of Bible reading and recitation of the Lord's prayer, followed by recitation of the Pledge); *Lee*, 505 U.S. at 583 (noting that "the students stood for the Pledge of Allegiance and remained standing during the rabbi's prayers.").

Several other Supreme Court cases contain explicit references to the constitutionality of the Pledge. *See Engel*, 370 U.S. at 440 n.5 (Douglas, J., concurring) ("[The Pledge] in no way run[s] contrary to the First Amendment") (quoting H.R. Rep. No. 1693, 83d Cong., 2d Sess., p. 3); *Schempp*, 374 U.S. at 304 (Brennan, J., concurring) ("[R]eciting the pledge may be no more of a religious exercise than the reading aloud of Lincolns' Gettysburg Address."); *Wallace*, 472 U.S. at 78 n.5 (O'Connor, J., concurring) ("[T]he words 'under God' in the Pledge . . . serve as an acknowledgment of religion."); *Co. of Allegheny* v. *ACLU*, 492 U.S. 573, 602-03 (Blackmun, J., for the court) ("Our previous opinions have considered in dicta . . . the pledge, characterizing [it] as consistent with the proposition that government may not communicate an endorsement of religious belief."); *Lynch* v. *Donnelly*, 465 U.S. 668,

676 (1984) (Burger, C.J., for the court) ("Other examples of reference to our religious heritage are found . . . in the language 'One nation under God,' as part of the Pledge of Allegiance to the American flag. That pledge is recited by many thousands of public school children—and adults—every year.").

The panel majority's answer to these myriad statements from our high court is summarily to dismiss them as dicta. However, "dicta of the Supreme Court have a weight that is greater than ordinary judicial dicta as prophecy of what that Court might hold. We should not blandly shrug them off because they were not a holding." *Zal* v. *Steppe*, 968 F.2d 924, 935 (9th Cir. 1992) (Noonan, J., concurring and dissenting in part); *see also United States* v. *Baird*, 85 F.3d 450, 453 (9th Cir. 1996) ("[W]e treat Supreme Court dicta with due deference.").[17]

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[17] Other courts have, unremarkably enough, not been so flippant when it comes to considering consistent Supreme Court dicta on this issue. *See Sherman*, 980 F.2d at 448 ("[A]n inferior court had best respect what the majority says rather than read between the lines. If the Court proclaims that a practice is consistent with the establishment clause, we take its assurances seriously. If the Justices are just pulling our leg, let them say so."); *Gaylor* v. *United States*, 74 F.3d 214, 217 (10th Cir. 1996) ("[T]his court considers itself bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements."); *ACLU* v. *Capital Square Review*, 243 F.3d 289, 301 n.10 (6th Cir. 2001) ("We should . . . be amazed if the Supreme Court were now to question the constitutionality of the [revised Pledge]"). Indeed, the unanimity on this point relative to *Newdow II* is striking.

C

The *Newdow II* majority, then, finds itself caught between a rock and a hard place—the recitation of the Pledge is not a formal religious act, while patriotic invocations of God do not give rise to Establishment Clause violations. It nonetheless manages to skirt these obstacles to reach its indirect coercion analysis. *Newdow II*'s conclusory foray into the social sciences is a case study, an advertisement, for why it is that the Supreme Court has anchored coercion analysis only to those situations where "formal religious exercises" take place in our public schools. The panel majority seeks to protect dissenters at the risk of courting some unpopularity, but this is not the test. "[O]ffense alone does not in every case show a violation . . . . and sometimes to endure social isolation or even anger may be the price of conscience or nonconformity." *Lee*, 505 U.S. at 597-98. The *Newdow II* majority's expansive application of the coercion test is ill-suited to a society as diverse as ours, since almost *every* cultural practice is bound to offend *someone's* sensibilities. In affording Michael Newdow the right to impose his views on others, *Newdow II* affords him a right to be fastidiously intolerant and self-indulgent. In granting him this supposed right, moreover, the two-judge panel majority has not eliminated feelings of discomfort and isolation, it has simply shifted them from one group to another.

Newdow II's psychological ipse dixit is also delivered without reference or regard to our collective experience in the half-century since the passage of the offending statute. In that time, generations of Americans have grown up reciting the Pledge, religious tolerance and diversity has flourished in this country, and we have become a beacon for other nations in this regard. As

Judge Fernandez observes, "it is difficult to detect any signs of incipient theocracy springing up since the Pledge was amended in 1954." *Newdow II* ___ F.3d at ___ n.4 (Fernandez, J., dissenting).

IV

In fairness to the *Newdow II* panel majority, its professed "neutrality" does have some plausible basis in the case law of the Supreme Court, which has undoubtedly constructed a "fractured and incoherent doctrinal path" in the Establishment Clause area, broadly speaking. *Sep. of Church and State Comm.* v. *City of Eugene*, 93 F.3d 617, 622 (9th Cir. 1996) (O'Scannlain, J., concurring). Indeed, its Establishment Clause cases sometimes "more closely resemble ad hoc Delphic pronouncements than models of guiding legal principles." *Ingebretsen* v. *Jackson Pub. Sch. Dist.*, 88 F.3d 274, 282 (5th Cir. 1996) (Jones, J., dissenting from denial of rehearing en banc). Supreme Court Justices themselves have recognized that if some of its reasoning "were to be applied logically, it would lead to the elimination" of many cherished, long-standing practices. *Co. of Allegheny*, 492 U.S. at 674 n.10 (Kennedy, J., dissenting).

With respect to the issue presented in *this* case, however, the Supreme Court has displayed remarkable consistency—patriotic invocations of God simply have no tendency to establish a state religion. Even Justice Brennan, that most stalwart of separationists, recognized that *some* official acknowledgment of God is appropriate "if the government is not to adopt a stilted indifference to the religious life of the people." *Lynch*, 465 U.S. at 714 (Brennan, J., dissenting). The decision reached in *Newdow II* does precisely that: it adopts a

stilted indifference to our past and present realities as a predominantly religious people.

But *Newdow II* goes further, and confers a favored status on atheism in our public life. In a society with a pervasive public sector, our public schools are a most important means for transmitting ideas and values to future generations. The silence the majority commands is *not* neutral—it itself conveys a powerful message, and creates a distorted impression about the place of religion in our national life. The absolute prohibition on any mention of God in our schools creates a bias *against* religion. The panel majority cannot credibly advance the notion that *Newdow II* is neutral with respect to belief versus non-belief; it affirmatively favors the latter to the former. One wonders, then, does atheism become the default religion protected by the Establishment Clause?

In short, a lack of clarity in the Supreme Court's Establishment Clause cases generally does not help to explain or to justify the panel majority's decision with respect to *this* particular issue. Put simply, the panel was asked to decide whether the recitation of the Pledge of Allegiance in public schools amounted to a government establishment of religion. The answer to that question is clearly, obviously, no. We made a grave error in failing to take *Newdow I* en banc, and we have failed to correct that error ourselves. Now we have *Newdow II*. Perhaps the Supreme Court will have the opportunity to correct the error for us. I must respectfully dissent from the order denying reconsideration en banc.

McKEOWN, Circuit Judge, with whom HAWKINS, THOMAS, and RAWLINSON, Circuit Judges, join, dissenting from the denial of rehearing en banc:

The recitation of the Pledge of Allegiance by school children presents a constitutional question of exceptional importance that merits reconsideration by the en banc court. *See* Fed. R. App. P. 35(a)(2) (en banc hearing appropriate when "the proceeding involves a question of exceptional importance"). Although not every case of exceptional importance can or should be reheard en banc, this is a case that should be reheard. I respectfully dissent from the court's decision to deny rehearing en banc.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-16423

MICHAEL A. NEWDOW, PLAINTIFF-APPELLANT

v.

U.S. CONGRESS; UNITED STATES OF AMERICA; GEORGE W. BUSH,* PRESIDENT OF THE UNITED STATES; STATE OF CALIFORNIA; ELK GROVE UNIFIED SCHOOL DISTRICT; DAVID W. GORDON, SUPERINTENDENT EGUSD; SACRAMENTO CITY UNIFIED SCHOOL DISTRICT; JIM SWEENEY, SUPERINTENDENT SCUSD, DEFENDANTS-APPELLEES

Dec. 4, 2002

ORDER

Before: GOODWIN, REINHARDT and FERNANDEZ, Circuit Judges.

Order by Judge GOODWIN; Concurrence by Judge FERNANDEZ.

GOODWIN, Circuit Judge.

After we issued our June 26, 2002 opinion in this case, Sandra Banning, the mother of Michael Newdow's

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* George W. Bush is substituted for his predecessor, William Jefferson Clinton, as President of the United States. Fed. R. App. P. 43(c)(2).

daughter, filed a motion for leave to intervene, in order to, *inter alia*, challenge Newdow's standing to maintain this action. Banning attached to her motion as an exhibit a copy of a February 6, 2002 California Superior Court custody order. That order awarded Banning "sole legal custody" of the child. We have carefully reconsidered the question of Newdow's Article III standing in light of this custody order and affirm our holding that he has standing as a parent to continue to pursue his claim in federal court.

I. FACTUAL AND PROCEDURAL BACKGROUND

When this case first reached us from the district court, no legal custody question or order had been disclosed to the federal courts. Newdow had alleged in the district court that he was the father, and had custody of the minor child. The record now indicates that Newdow and Banning formed a family consisting of an unmarried man, an unmarried woman, and their biological minor child, who lived together part of the time and lived in separate homes in Florida and California, from time to time, with informal visiting arrangements. This informal arrangement apparently was not subject to any custody order until February 6, 2002, after Newdow had appealed from the dismissal of the action he had commenced in federal district court to challenge on Establishment Clause grounds the practice of reciting the pledge of allegiance in the public elementary school his child attends.

On February 6, the California Superior Court entered an order containing the following language:

> The child's mother, Ms. Banning, to have *sole* legal custody as to the rights and responsibilities to make decisions relating to the health, education and

> welfare of [the child]. Specifically, both parents shall consult with one another on substantial decisions relating to non-emergency major medical care, dental, optometry, psychological and educational needs of [the child]. If mutual agreement is not reached in the above, then Ms. Banning may exercise legal control of [the child] that is not specifically prohibited or inconsistent with the physical custody order. The father shall have access to all of [the child's] school and medical records.

Thereafter, Newdow, alleging "changed circumstances," filed a motion in the Superior Court for a modification of the custody order, seeking, *inter alia*, joint legal custody with Banning of their child.

On September 25, 2002, the Superior Court (Judge Mize) entered an *in personam* order enjoining Newdow from pleading his daughter as an unnamed party or representing her as a "next friend" in this lawsuit. The United States promptly filed a motion, which we have granted, to enlarge the record to include the state court transcript of the September 25 hearing before Judge Mize. That transcript contemplates a full trial in the future on Newdow's motion for modification of the February 6 custody order.

Judge Mize appropriately reserved to this court, however, the question of Newdow's Article III standing in federal court. Newdow no longer claims to represent his child, but asserts that he retains standing in his own right as a parent to challenge alleged unconstitutional state action affecting his child while she attends public school in the Elk Grove Unified School District (EGUSD).

II. DISCUSSION

Our original opinion in this case holds that a parent has Article III standing to challenge on Establishment Clause grounds state action affecting his child in public school. *See Newdow* v. *U.S. Congress*, 292 F.3d 597, 602 (9th Cir. 2002) (citing *Doe* v. *Madison Sch. Dist. No. 321*, 177 F.3d 789, 795 (9th Cir. 1999) (en banc) and *Grove* v. *Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1532 (9th Cir. 1985)). Banning's motion for leave to intervene presents a question of first impression in this Circuit which we are required to consider, even though raised for the first time on appeal. *See United States* v. *Viltrakis*, 108 F.3d 1159, 1160 (9th Cir. 1997) ("[T]he jurisdictional issue of standing can be raised at any time."). Does the grant of sole legal custody to Banning deprive Newdow, as a noncustodial parent, of Article III standing to object to unconstitutional government action affecting his child?

A Seventh Circuit decision, *Navin* v. *Park Ridge School District 64*, 270 F.3d 1147 (7th Cir. 2001) (per curiam), addresses a noncustodial parent's standing to challenge a school's educational plan for his disabled child under the Individuals with Disabilities Education Act (IDEA). Though not controlling, the Seventh Circuit's reasoning in *Navin* illustrates a useful method of analysis for the standing question presented here. The divorce decree in that case had granted the mother sole legal custody of her son. The Illinois Marriage and Dissolution of Marriage Act provided that the legal custodian may determine, absent an agreement by the parties to the contrary, "the child's uprising, including but not limited to, his education, health care and religious training." *See* 750 IL CH § 5/608(a). Contending that tutoring for his dyslexic son was being provided by

a "crossing guard supervisor with no skill (or at least no certification) in educating dyslexic youths," the father in *Navin* had asked for an administrative hearing under the IDEA and filed suit in federal court when the hearing officer terminated the proceeding without addressing the merits. 270 F.3d at 1148. The district court dismissed the father's suit, holding that as a noncustodial parent, he had no standing to challenge action affecting his child in school. *Id.*

The Seventh Circuit held, however, that noncustodial parents do not automatically lack standing under the IDEA. *Id.* at 1149. Instead, the court of appeals explained that whether the noncustodial father in *Navin* had standing depended on the parental rights granted or reserved to him in the divorce decree in light of the mother's assertion of her rights so granted or reserved:

> If the decree had wiped out all of [the noncustodial father's] parental rights, it would have left him with no claim under the IDEA. But this is not what the divorce decree does. The district court did not analyze its language, but it is in the record and shows that [the noncustodial father] retains some important rights, including the opportunity to be informed about and remain involved in the education of his son. If [the father and mother] disagree about educational decisions, then [the mother's] view prevails—unless under state law the school district's view prevails over *either* parent's wishes, and in that event [the father's] rights under the decree to influence the school's choices are even more important.

270 F.3d at 1149-1150 (internal citations omitted) (emphasis in original). Accordingly, the Seventh Circuit

remanded the case to the district court, instructing it to "decide whether [the father's] claims [were] incompatible, *not* with the divorce decree itself, but with [the mother's] use of her rights under the decree." *Navin*, 270 F.3d at 1149-1150 (emphasis in original).

Navin's general approach to the problem of noncustodial parental standing is sound. We hold that a noncustodial parent, who retains some parental rights, may have standing to maintain a federal lawsuit to the extent that his assertion of retained parental rights under state law is not legally incompatible with the custodial parent's assertion of rights. This holding assumes, of course, that the noncustodial parent can establish an injury in fact that is fairly traceable to the challenged action, and it is likely that the injury will be redressed by a favorable decision. *See Friends of the Earth* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000). Having already held that Newdow satisfies those Article III requirements, *see Newdow*, 292 F.3d at 603-05, we now turn to the question of whether he retains standing despite Banning's opposition as sole legal custodian to his maintaining this lawsuit.[1]

The February 6 custody order governing Banning's and Newdow's respective parental decision-making power remains operative and plainly does not strip Newdow of all of his parental rights. Rather, that order establishes that Newdow retains rights with respect to his daughter's education and general welfare. He has

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[1] It is unclear to us exactly what relief Banning seeks. In her motion papers, at times Banning appears to object only to Newdow's appearance as "next friend" of their daughter. At other places, she also seems to object to Newdow's standing in his own right.

the right to consult with Banning regarding substantial non-emergency decisions (with Banning having ultimate decision-making power), as well as the right to inspect his daughter's school and medical records regardless of Banning's position.

California state courts have recognized that noncustodial parents maintain the right to expose and educate their children to their individual religious views, even if those religious views contradict those of the custodial parent or offend her.[2] *See Murga* v. *Petersen*, 103 Cal. App.3d 498, 163 Cal. Rptr. 79 (1980). As the *Murga* court noted, it was following the "*majority of American jurisdictions*" in refusing to place restraints on a noncustodial parent who wished to expose his children to his particular religious views, absent a clear, affirmative showing that these religious activities would be harmful to the children. *Id.* at 504-05, 163 Cal. Rptr. 79 (emphasis added). The principle of nonintervention, the court noted, "reflects the protected nature of religious activities and expressions of belief, as well as the proscription against preferring one religion over another." *Id.* at 505, 163 Cal. Rptr. 79. It is not only the court that must not interfere; even more so, the state and federal government may not seek to indoctrinate the child with their religious views, particularly over the objection of *either* parent.

Murga was the basis for a later California state court decision, *In re Mentry*, 142 Cal. App.3d 260, 190 Cal. Rptr. 843 (1983), that reversed a restraining order against a noncustodial father that forbade him from

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[2] As the Supreme Court has acknowledged, recognized religions exist that do not teach a belief in God, e.g., secular humanism. *Torcaso* v. *Watkins*, 367 U.S. 488, 495 n.11, 81 S. Ct. 1680, 6 L. Ed. 2d 982 (1961).

engaging his children in any religious activities other than those approved by the custodial mother. The *Mentry* court stated that "the concept of family privacy embodies not simply a policy of *minimum state intervention* but also a presumption of parental autonomy. Many of the purposes served by this presumption become *more important after dissolution* [of the marriage or relationship] than they were before." 142 Cal. App.3d at 268, 190 Cal. Rptr. 843 (emphasis added). The type of "*minimum state* intervention" discussed in *Mentry* surely does not permit official state indoctrination of an impressionable child on a daily basis with an official view of religion contrary to the express wishes of *either* a custodial or noncustodial parent. We conclude that Newdow retains sufficient parental rights to support his standing here.

The next question, then, is whether Banning's status as sole legal custodian empowers her to employ state law to defeat Newdow's standing. "'Sole legal custody' means that one parent shall have the right and the responsibility to make the decisions relating to the health, education, and welfare of a child." Cal. Fam. Code § 3006. Thus, Newdow cannot disrupt Banning's choice of schools for their daughter. And, as Judge Mize's September 25 order makes clear, Newdow cannot name his daughter as a party to a lawsuit against Banning's wishes.

Judge Mize, however, appropriately declined to rule on whether Newdow has standing in his own right as a parent to maintain this case in federal court. We hold that Banning has no power, even as sole legal custodian, to insist that her child be subjected to unconstitutional state action. Newdow's assertion of his retained parental rights in this case, therefore, simply cannot be

legally incompatible with any power Banning may hold pursuant to the custody order. Further, Ms. Banning may not consent to unconstitutional government action in derogation of Newdow's rights or waive Newdow's right to enforce his constitutional interests. Neither Banning's personal opinion regarding the Constitution nor her state court award of legal custody is determinative of Newdow's legal rights to protect *his own* interests.

When school teachers lead a recitation of the Pledge of Allegiance according to school district policy, they present a message by *the state* endorsing not just religion generally, but a monotheistic religion organized "under God." While Newdow cannot expect the entire community surrounding his daughter to participate in, let alone agree with, his choice of atheism and his daughter's exposure to his views, he can expect to be free from the government's endorsing a particular view of religion and unconstitutionally indoctrinating his impressionable young daughter on a daily basis in that official view. The pledge to a nation "under God," with its imprimatur of governmental sanction, provides the message to Newdow's young daughter not only that non-believers, or believers in non-Judeo-Christian religions, are outsiders, but more specifically that her *father's* beliefs are those of an outsider, and necessarily inferior to what she is exposed to in the classroom. Just as the foundational principle of the Freedom of Speech Clause in the First Amendment tolerates unpopular and even despised ideas, *see Cohen* v. *California*, 403 U.S. 15, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971), so does the principle underlying the Establishment Clause pro-

tect unpopular and despised minorities from government sponsored religious orthodoxy tied to government services. *See Santa Fe Independent Sch. Dist.* v. *Doe*, 530 U.S. 290, 120 S. Ct. 2266, 147 L. Ed. 2d 295 (2000); *Lee* v. *Weisman*, 505 U.S. 577, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992). Accordingly, we affirm Newdow's standing to challenge on Establishment Clause grounds the EGUSD's practice of requiring his daughter to attend daily recitations of the 1954 version of the Pledge of Allegiance.

Banning's motion for leave to intervene is DENIED because she has no protectable interest at stake in this action.

FERNANDEZ, Circuit Judge, concurring:

I concur in the order, but write separately to emphasize that in this order we decide that Newdow's legal status under California law vis-à-vis his daughter does not deprive him of standing. Despite the order's allusions to the merits of the controversy, we decide nothing but that narrow standing issue.[1] Leastwise, I join nothing other than the narrow decision that the orders of the California courts have not deprived Newdow of standing.

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[1] For my view on the merits question, see *Newdow* v. *U.S. Congress*, 292 F.3d 597, 612-15 (9th Cir. 2002) (Fernandez, J., concurring and dissenting.)

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-16423

MICHAEL A. NEWDOW, PLAINTIFF-APPELLANT

v.

U.S. CONGRESS; UNITED STATES OF AMERICA; GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES; STATE OF CALIFORNIA; ELK GROVE UNIFIED SCHOOL DISTRICT; DAVID W. GORDON, SUPERINTENDENT EGUSD; SACRAMENTO CITY UNIFIED SCHOOL DISTRICT; JIM SWEENEY, SUPERINTENDENT SCUSD, DEFENDANTS-APPELLEES

Dec. 4, 2002

ORDER

Before: GOODWIN, REINHARDT and FERNANDEZ, Circuit Judges.

FERNANDEZ, Circuit Judge.

Once we ruled on the merits of this case,[1] the United States Senate sought to intervene as a party and in that capacity to file a petition for rehearing and a petition for rehearing en banc. We deny the Motion to Intervene, but note our willingness to accept the petition and accompanying brief as an amicus brief, if the Senate

[1] *Newdow* v. *U.S. Congress*, 292 F.3d 597 (9th Cir. 2002).

consents to the latter use of its filing. Because of the respect that we owe to and have for the Senate, we are constrained to explain the reasons for our denial of intervention.

Initially, of course, we lay aside the usual intervention rule. *See* Fed. R. Civ. P. 24(a)(2). This case is more in line with Fed. R. Civ. P. 24(a)(1), which allows intervention as of right "when a statute of the United States confers an unconditional right to intervene." There is a special statute that applies to this motion. As relevant here, the statute first provides that the Senate Legal Counsel shall intervene or appear as amicus "when directed to do so by a resolution adopted by the Senate." 2 U.S.C. § 288b(c). There was a resolution here. *See* Senate Resolution 292, 107th Cong., 2d Sess. (2002), 148 Cong. Rec. S6105-06 (2002). The statute goes on to provide that Counsel shall intervene upon appropriate direction when "the powers and responsibilities of Congress under the Constitution of the United States are placed in issue," but should only do so if there is standing. *See* 2 U.S.C. § 288e(a). It then states:

> Permission to intervene as a party or to appear as amicus curiae under § 288e of this title shall be of right and may be denied by a court only upon an express finding that such intervention or appearance is untimely and would significantly delay the pending action or that standing to intervene has not been established under section 2 of article III of the Constitution of the United States.

2 U.S.C. § 288*l* (a).

Because the Senate waited until we had already ruled on the merits of this case on appeal, it would be

possible, even accurate, to hold that the attempt to intervene is untimely. However, under the circumstances we are unable to hold that the proposed intervention to seek rehearing or en banc review would "significantly delay" the action. Especially is that true when, as here, some of the current parties to the action have themselves already sought both types of review. We must, therefore, turn our attention to the second exception in § 288*l*(a)—does the Senate have constitutional standing? To put it more precisely: does the Senate have constitutional standing to intervene in every case where the constitutionality of a United States statute is challenged? Because we determine that the answer to that question is no and because there is nothing about the statute at hand that would distinguish it from other statutes, the Senate does not have standing in this case.

Let it first be said that the issue is not whether the United States has standing to appear in support of the constitutionality of the statute in question. Nobody doubts that it does. *See* 28 U.S.C. § 2403(a). In fact, in this case it did appear for "the Congress of the United States; the United States of America; and William J. Clinton, President of the United States."[2] The question is whether the Senate, as a separate part of the government, has standing to intervene to support statutes on its own behalf, and not really as a representative of the United States itself. We need not, and do not,

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[2] Perhaps it should also be recognized that "the three branches are but 'coordinate parts of one government,'" and in that sense there can be no doubt that the legislature is already represented here anyway. *See United States* v. *Providence Journal Co.*, 485 U.S. 693, 701, 108 S. Ct. 1502, 1507, 99 L. Ed. 2d 785 (1988) (internal citation omitted).

decide whether Congress could designate the Senate Legal Counsel, upon a separate resolution of the Senate alone, to appear as the defender of all statutes on behalf of the United States itself. A law of that type might well have its own constitutional problems; it might even trench on the prerogatives of the executive branch of the United States, which has the authority to execute the laws of this country. *See* U.S. Const. art. II, § 3. At any rate, that has not occurred here. As already stated, a separate statute confers *that* authority upon the executive branch, and here the Senate seeks to appear to represent itself alone.

As the intervention statute at hand expressly recognizes, the Senate must show that it does have constitutional standing to intervene. That means at the very least that it must show that it has "suffered an 'injury in fact'—an invasion of a legally protected interest which is . . . concrete and particularized." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136, 119 L. Ed.2d 351 (1992); *see also Raines* v. *Byrd*, 521 U.S. 811, 818-20, 117 S. Ct. 2312, 2317-18, 138 L. Ed. 2d 849 (1997). That concrete and particularized harm is lacking in this case because no harm beyond frustration of a general desire to see the law enforced as written has been shown here.

In so stating, we are aware that there have been a number of cases wherein Senate intervention has been allowed without any particular remark or detailed consideration. *See*, *e.g.*, *INS* v. *Chadha*, 462 U.S. 919, 930 n.5, 103 S. Ct. 2764, 2773 n.5, 77 L. Ed. 2d 317 (1983); *Lear Siegler, Inc., Energy Prod. Div.* v. *Lehman*, 893 F.2d 205, 206 (9th Cir. 1990) (en banc); *In re Benny*, 812 F.2d 1133, 1135 (9th Cir. 1987); *see also Bowsher* v. *Synar*, 478 U.S. 714, 106 S. Ct. 3181, 92 L.

Ed. 2d 583 (1986). But those cases are not really apposite because they were of a character that directly (particularly) implicated the authority of Congress within our scheme of government, and the scope and reach of its ability to allocate power among the three branches. Thus, *Chadha*, 462 U.S. at 956-58, 103 S. Ct. at 2787, is a case that dealt with individual houses of Congress assuming the authority to review and veto executive decisions regarding the deportation of aliens. It, thus, implicated separation of powers doctrine and the whole scheme of our government. *Lear Siegler* dealt with whether Congress could allocate to a legislative agent—The Comptroller General—the authority to delay the procurement actions of the executive branch of the government. *See Lear Siegler, Inc., Energy Prod. Div.* v. *Lehman*, 842 F.2d 1102, 1105-06 (9th Cir. 1988), *vacated on other grounds*, *Lear Siegler*, 893 F.2d at 208; *see also Bowsher*, 478 U.S. at 717, 106 S. Ct. at 3183. Finally, in *Benny*, 812 F.2d at 1141-42, the issue was whether Congress had the authority to prospectively extend the term of office of bankruptcy judges. In other words, in each of these cases the courts were dealing with a statute addressing legislative action regarding allocation of authority within the government, as opposed to action applying that authority to the behavior of the citizenry in general. The issues were the kind that intimately affected Congress's own place within our constitutional scheme.

More closely on point are cases which speak to the standing of legislators to bring actions, where their institutional power as members of the legislature is not being challenged. In *Raines*, 521 U.S. at 814-16, 117 S. Ct. at 2315-16, for example, a number of members of the Senate and House of Representatives sued pursuant to

a provision of the Line Item Veto Act which declared that any member of Congress could challenge the Act. *See*, 2 U.S.C. § 692(a)(1). The Court declared that they had "alleged no injury to themselves as individuals . . ., the institutional injury they allege is wholly abstract and widely dispersed . . ., and their attempt to litigate this dispute at this time and in this form is contrary to historical experience." *Id.* at 829, 117 S. Ct. at 2322. The Court did point out that they did not actually represent their separate houses of Congress and those houses actually opposed them, but did not indicate precisely how that affected their standing.[3] *Id.* The Court distinguished an earlier case wherein state legislators were accorded standing because their votes would have been deprived of all validity if an allegedly improper person were able to vote. *See Coleman* v. *Miller*, 307 U.S. 433, 438, 59 S.Ct. 972, 975, 83 L. Ed. 1385 (1939). Thus, at least as to individual legislators, there is no standing unless their own institutional position, as opposed to their position as a member of the body politic, is affected.

The District of Columbia Circuit has followed the same approach. In 1977, a congressman sued the director of the Central Intelligence Agency partly on the basis that when that agency misused its budget, his vote as a congressman was impaired. *See Harrington* v. *Bush*, 553 F.2d 190, 204 (D.C. Cir. 1977). The court found that he lacked standing, and that a contrary rule would amount to giving him "a roving commission to obtain judicial relief under most circumstances." *Id.* at

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[3] Of course, the Line Item Veto Act dealt with the allocation of power between the legislative and executive branches. *See* 2 U.S.C. §§ 691-692. However, the Senate was content to appear as *amicus curiae*. *Raines*, 521 U.S. at 813 n.*, 117 S. Ct. 2312.

214. Along the way, the court noted that "his specific rights, interests and prerogatives lie in the power to make laws. As we have noted, this power has not been invaded, diminished, diluted, or injured by the challenged actions in this case." *Id.* at 213. A like result was reached when a member of Congress sued to prevent alleged misuse of federal funds by a national commission. *See Hansen* v. *Nat'l Comm'n. on the Observance of Int'l Women's Year*, 628 F.2d 533 (9th Cir. 1980). We said: "The injury alleged by appellant is an injury which he suffers along with all other citizens of the United States. He has not presented any facts which show he has sustained or is imminently in danger of sustaining an actual personal injury." *Id.* at 534. Thus, he had no standing. *Id.* And, when faced with a claim by congressmen that the military was using its budget to finance combat in other countries, despite laws prohibiting that, the Fourth Circuit had this to say: "Once a bill has become law, however, their interest is indistinguishable from that of any other citizen. They cannot claim dilution of their legislative voting power because the legislation they favored became law." *Harrington* v. *Schlesinger*, 528 F.2d 455, 459 (4th Cir. 1975). The court was no more impressed with the claim that their legislative duties would somehow be affected. *See id.* Other cases have sounded the same note. *See*, *e.g.*, *Baird* v. *Norton*, 266 F.3d 408, 411-12 (6th Cir. 2001); *Chenoweth* v. *Clinton*, 181 F.3d 112, 112-13, 117 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1012, 120 S. Ct. 1286, 146 L. Ed. 2d 233 (2000); *Daughtrey* v. *Carter*, 584 F.2d 1050, 1057-58 (D.C. Cir. 1978); *Metcalf* v. *Nat'l Petroleum Council*, 553 F.2d 176, 187-89 (D.C. Cir. 1977).

These observations also apply to the Senate as a whole, when it seeks to have a roving commission to enter every case involving the constitutionality of statutes it has enacted. In those instances, its own "powers and responsibilities" are not really under attack. Once the Senate has approved a proposed bill, the House of Representatives agrees, and the President has signed the measure, it becomes public law. A public law, after enactment, is not the Senate's any more than it is the law of any other citizen or group of citizens in the United States. It is a law of the United States of America, and the government is already represented in this case by the Attorney General. Of course, every time a statute is not followed or is declared unconstitutional, the votes of legislators are mooted and the power of the legislature is circumscribed in a sense, but that is no more than a facet of the generalized harm that occurs to the government as a whole. By the same token, the President's signing of the legislation is also nullified, judges, who might have felt otherwise, are bound by the decision, and citizens who relied upon or desired to have the law enforced are disappointed.[4] Moreover, if the separate houses of Congress have standing, a challenger of a law would have to contend with fighting the United States itself, and separately defending himself against the Senate and the House of

[4] All of this is underscored by the Senate's suggestion that it should have standing because it opens its daily sessions with the Pledge of Allegiance. That, of course, is an assertion that could be made by countless other organizations, governmental and otherwise, not to mention thousands of United States citizens.

Representatives, each of which would be able to appear as a separate litigating party in the case.[5]

Therefore, the motion of the Senate to intervene is DENIED. However, if the Senate wishes to have us deem its proposed brief to be an amicus brief and to consider it on that basis, we will do that. It should inform us of its desire in that regard within 30 days after the filing of this order.

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[5] In principle, he might also have to separately contend against the President, whose ability to effectively sign the law in question can be said to have been affected. We see little other than mischief arising from a system of intervention as unregulated as that. Constitutional standing doctrine is the apotropaion for that threatened malady. It must be applied here.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-16423

MICHAEL A. NEWDOW, PLAINTIFF-APPELLANT

v.

U.S. CONGRESS; UNITED STATES OF AMERICA; GEORGE W. BUSH,* PRESIDENT OF THE UNITED STATES; STATE OF CALIFORNIA; ELK GROVE, UNIFIED SCHOOL DISTRICT; DAVID W. GORDON, SUPERINTENDENT EGUSD; SACRAMENTO CITY UNIFIED SCHOOL DISTRICT; JIM SWEENEY, SUPERINTENDENT SCUSD, DEFENDANTS-APPELLEES

Dec. 4, 2002

ORDER

Before: GOODWIN, REINHARDT and FERNANDEZ, Circuit Judges.

Sandra Banning's motion for leave to intervene is DENIED.

The State of California's purported appearance in this appeal is rejected, and its purported petition for

* George W. Bush is substituted for his predecessor, William Jefferson Clinton, as President of the United States. Fed. R. App. P. 43(c)(2).

rehearing with suggestion for rehearing en banc, filed July 25, 2002, is ORDERED STRICKEN.

Newdow's motion for judicial notice is DENIED.

Newdow's motion for sanctions against Banning's attorneys is DENIED.

Sandra Banning's application for leave to file sur-response to Newdow's motion for sanctions IS DENIED.

Newdow's motion to file response to federal and state defendants' supplemental briefs is DENIED.

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CIV S-00-0495 MLS PAN PS

REV. DR. MICHAEL A. NEWDOW, PLAINTIFF

v.

THE CONGRESS OF THE UNITED STATES, ET AL., DEFENDANTS

[Filed July 21, 2000]

ORDER

This matter was referred to the Honorable Peter A. Nowinski, United States Magistrate Judge, pursuant to 28 U.S.C. §§ 636, et seq., and Local Rule 72-302. On May 25, 2000, Judge Nowinski recommended that plaintiff's complaint be dismissed. Plaintiff has filed objections to the findings and recommendation.

The court has reviewed the file and finds the findings and recommendation to be supported by the record and by the magistrate judge's analysis. Accordingly, IT IS HEREBY ORDERED that:

1. The Findings and Recommendation filed May 25, 2000, are adopted in full; and

2. Plaintiff's complaint is dismissed.

DATE: July 21, 2000.

/s/ illegible signature
UNITED STATES DISTRICT JUDGE

APPENDIX H

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

CIV S-00-0495 MLS PAN PS

REV. DR. MICHAEL A. NEWDOW, PLAINTIFF

v.

THE CONGRESS OF THE UNITED STATES,
ET AL., DEFENDANTS

[Filed: May 25, 2000]

FINDINGS AND RECOMMENDATION

On March 8, 2000, plaintiff filed a complaint alleging defendants Elk Grove School District and Sacramento City Unified School District violate the Establishment Clause of the First Amendment by requiring teachers [to] lead morning classes in recitation of the pledge of allegiance. Defendant school districts move to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

The only federal Court of Appeal directly to address this issue held that schools may lead the pledge of allegiance without violating the First Amendment so long as pupils are not compelled to participate, because the ceremonial reference to God in the pledge does not convey endorsement of particular religious beliefs. *Sherman* v. *Community Consolidated School District*, 980 F.2d 437, 442-448 (11th Cir. 1992). While the

Supreme Court has not directly addressed the issue, it has noted that its "previous opinions have considered in dicta the motto [`In God We Trust'] and the pledge [of allegiance], characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief." *County of Allegheny* v. *American Civil Liberties Union*, 492 U.S. 573, 602-03 (1989); *see also id.* at 625 (O'Connor, J., concurring); *Lynch* v. *Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring); *id.* at 716-17 (Brennan, J., dissenting); *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 303 (1963) (Brennan, J., concurring); *Engel* v. *Vitale*, 370 U.S. 421, 449-50 (1962) (Stewart, J., dissenting). Two Courts of Appeal have stated, also in dicta, that the pledge is not an endorsement of religion. *See Chandler* v. *James*, 180 F.3d 1254, 1262 (11th Cir. 1999); *Separation of Church and State Committee* v. *City of Eugene*, 93 F.3d 617, 622 (9th Cir. 1996).

The Seventh Circuit's decision in *Sherman* and the statements in dicta noted above, while not binding on this court, are persuasive and directly on point. Whether the court employs the test set forth in *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971), or the more recent endorsement test, *see Allegheny*, *supra*, 492 U.S. at 593-594, the Pledge does not violate the Establishment Clause of the First Amendment. Accordingly, I recommend plaintiff's complaint be dismissed.

Dated: May 25, 2000.

/s/ illegible signature
PETER A. NOWINSKI
United States Magistrate Judge

APPENDIX I

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion; or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Section 4 of Title 4 U.S.C. provides:

Pledge of allegiance to the flag; manner of delivery

The Pledge of Allegiance to the Flag, "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.", should be rendered by standing at attention facing the flag with the right hand over the heart. When not in uniform men should remove their headdress with their right hand and hold it at the left shoulder, the hand being over the heart. Persons in uniform should remain silent, face the flag, and render the military salute.